(28,197)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 280.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., PETITIONER,

vs.

PHILIP A. WARNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1921.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Philip A. Warner, Plaintiff, and Gaston, Williams & Wigmore of Canada, Ltd., Defendant, a manifest error hath happened to the great damage of the said Plaintiff, as is said and appears by his complaint. We, being willing that such error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the
2 same at the said place, before the Judges aforesaid, upon the 24th day of April, 1920, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 24th day of March, in the year of our Lord, one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

LEARNED HAND,
U. S. D. J.

3 *Summons.*

United States District Court for the Southern District of New York.

L. 18/85.

PHILIP A. WARNER

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within

twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 11th day of January, in the year one thousand nine hundred and eighteen.

ALEX. GILCHRIST,
Clerk.

JOSEPH P. NOLAN,
Plaintiff's Attorney.

Office and Postoffice Address, 25 Broad Street, Borough of Manhattan, New York City.

4 *Complaint.*

District Court of the United States, Southern District of New York.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LIMITED, Defendant.

Plaintiff, complaining by Joseph P. Nolan, his attorney, for a cause of action against the defendant alleges:

For a First Cause of Action.

First. That the plaintiff is a citizen of the State of New York and resides in the Borough of Manhattan, City, County and State of New York, in the Southern District of New York.

Second. That the defendant is a corporation organized and existing under the laws of the Dominion of Canada, having an office for the transaction of business in the Southern District of New York.

5 Third. That at the times hereinafter mentioned the defendant was the owner of the British screw SS. Eskasoni of St. Johns, Newfoundland, and on the 11th and 12th days of December, 1916, and for a long time prior thereto, had offered the said screw SS. Eskasoni for sale; that on the 11th and 12th days of December, 1916, the defendant agreed with the plaintiff that if the plaintiff should succeed in finding a purchaser for the said SS. Eskasoni at the price of $475,000.00 the defendant would pay to the plaintiff the sum of 2½% upon such purchase price for his services in the matter; that thereafter this plaintiff procured Philip Templeman and George A. Moulton, as purchasers of the said steamship, who thereupon began negotiations for the same, and who thereafter entered into a contract of purchase and charter for the said steamship with the defendant herein for the purchase price of $475,000.

Fourth. That the said sale was effected by and through the efforts of this plaintiff, and plaintiff thereby became entitled under said agreement to receive for his services in connection therewith the sum of $11,675.00.

Fifth. That no part of said sum has been paid to the plaintiff, although payment thereof has been duly demanded of the defendant, except the sum of $125.00, which amount was paid to the plaintiff on the 15th day of March, 1917.

6 For a Second Cause of Action.

Sixth. The plaintiff herein repeats and realleges the allegations contained in paragraphs "First" and "Second" of the first cause of action.

Seventh. That at the times hereinafter mentioned the defendant was the owner of the British screw SS. Eskasoni of St. Johns, Newfoundland.

Eighth. That between the 11th day of December, 1916, and the 15th day of March, 1917, the plaintiff rendered services to the defendant in and about the charter purchase sale of the British screw SS. Eskasoni which were of the fair, reasonable and agreed value of $11,875.00.

Ninth. That no part of the said sum of $11,875.00 has been paid to the plaintiff, although the same has been duly demanded of the defendant, except the sum of $125.00 which was paid on the 15th day of March, 1917.

Wherefore, plaintiff demands judgment against the defendant in the sum of Eleven thousand, seven hundred and fifty Dollars ($11,750.00), together with the costs and disbursements of this action.

JOSEPH P. NOLAN,
Attorney for Plaintiff.

25 Broad Street, New York City.

7 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Philip Warner, being duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

PHILIP A. WARNER.

Sworn to before me this 7th day of December, 1917.

[SEAL.] WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

8 *Answer.*

United States District Court, Southern District of New York.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LIMITED, Defendant.

The defendant, Gaston, Williams & Wigmore of Canada, Ltd., by Kirlin, Woolsey & Hickox, its attorneys, answering the complaint herein alleges as follows:

For an Answer to the First Cause of Action.

First. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of the complaint.

Second. It admits the matters alleged in the second paragraph of the complaint, except that it denies that it has an office for the transaction of business in the Southern District of New York.

Third. It admits that at the times mentioned in the complaint the defendant was the owner of the British steamship Eskasoni;
9 and that on the 11th and 12th days of December, 1916, and for some time prior thereto had offered said vessel for sale; and that on the 11th and 12th days of December, 1916, the defendant agreed with the plaintiff that if the plaintiff should secure a purchaser for the said vessel at the price of $475,000, the defendant would pay to the plaintiff the sum of 2½% of such purchase price for his services. Thereafter plaintiff procured Philip Templeman and George A. Moulton, as purchasers of the said vessel, who thereupon began negotiations for the charter and purchase of the vessel, and who thereafter attempted to enter into a contract for the purchase and charter of said steamship from the defendant at the purchase price of $475,000. It denies the other matters alleged in the third paragraph of the complaint.

Fourth. It denies all the matters alleged in the fourth paragraph of the complaint.

Fifth. It admits the matters alleged in the fifth paragraph of the complaint.

For an Answer to the Second Cause of Action.

Sixth. The defendant repeats and realleges the allegations contained in paragraphs first and second of the answer to the first cause of action.

Seventh: It admits the matters alleged in the seventh paragraph of the complaint.

Eight-. It denies all the matters alleged in the eight- paragraph of the complaint.

10 Ninth. It admits all the matters alleged in the ninth paragraph of the complaint.

Tenth. Further answering and as a further and separate defense to the first and second causes of action, and realleging all the denials in this answer contained, the defendant alleges that on December 12, 1916, at the time the alleged contract of purchase and charter for the steamship Eskasoni was entered into, Gaston, Williams & Wigmore of Canada, Ltd., and Philip Templeman and George A. Moulton, parties to the attempted contract, were subjects of the Kingdom of Great Britain and Ireland and residents of the Crown Colony of Newfoundland. The parties to the contract were British subjects and were subject to the laws, and commands and orders of the British Government. Previous to December 12, 1916, the defendant entered into a bunker coal agreement with the British Government by which it agreed to comply with certain instructions and rules of the British Government in the operation of its vessels and agreed that it would never charter any vessel to any one to whom the British Government objected. This fact was or should have been known by the plaintiff. Subsequent to December 12, 1916, the British Government, through the Consul General at New York, ordered the defendant not to proceed with the alleged agreement of charter and sale of the steamship Eskasoni, as the British Government would not permit the defendant to charter or sell the vessel to Philip Templeman and George A. Moulton. Therefore
11 the plaintiff did not produce purchasers of the steamship Eskasoni who had the power, right or privilege of chartering or buying the steamship Eskasoni, and who were capable and competent to charter or purchase the vessel and did not become entitled to any commissions or compensations under the agreement alleged in the complaint, and did not render any services of value to the defendant.

Eleventh. Further answering, and as a further and separate defense to the first and second causes of action, and realleging all the denials in this answer contained, and alleges on information and belief that at all the times mentioned in the complaint there was and there now is a well-known usage and custom existing in the shipping business in the Port of New York, that commissions under an agreement made between a ship broker and a shipowner to pay to the broker securing a charter commissions on the gross amount of the charter do not become due and payable except as when hire is paid by the charterer to the owner, and if during the charter period the charter comes to an end in pursuance of its terms without fault on the part of the shipowner or if the shipowner rightfully cancels and terminates the charter party the commission due from hire which the broker would have received if it had been earned ceases as of the date of such cancellation. The usage and custom of the Port of New York as above set forth was incorporated in the agreement for commissions herein. There was not any purchase money paid to

or charter hire earned by defendant under the above men-
12 tioned attempted contract for chartering or selling the steamship Eskasoni. Wherefore, defendant is discharged from any liability if such exists, to the plaintiff for commissions.

Twelfth. The attempted contract for chartering and selling the steamship Eskasoni alleged in the complaint contained among others the following provision:

"12. Licenses and Permits. Charterers agree to procure under British or Dominion Governments or the Government of Newfoundland as it may be necessary, any licenses or permits which may now be or which may hereafter become necessary as a condition of entering into any trade which the said charterers may wish to employ the said steamship and to comply in all respects with the said licenses and permits, and with any laws and governmental proclamations, rules, regulations and/or restrictions which may be applicable to the said British steamship. And by supplementary agreement agree * * * that in the event of said vessel being requisitioned by the British Government or by any department thereof, that space be commandeered by said Government or in the event of arrest or other restraint of princes, rulers and people, that then and in that event said charter party may at the option of yourselves or ourselves be canceled, and each of us fully discharged from any obligation to the other thereunder; and any moneys which may have heretofore been paid on account of same, shall be returned to you without interest."

13 Immediately after the said contract was attempted to be entered into the British Government issued orders to the defendant prohibiting it from chartering or selling the vessel to Philip Templeman and George A. Moulton.

Therefore, by an act of Government, and not by reason of any default on the part of this defendant, the charter party and agreement to sell the vessel became void ab initio, and the defendant was discharged from any liability to the plaintiff for commissions as alleged in the complaint.

Wherefore, defendant prays that the complaint herein be dismissed with costs to it against the plaintiff and for such other and further relief as may be just.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Defendant.

Office and Post Office Address, 27 William Street, Borough of Manhattan, City of New York.

14 STATE OF NEW YORK,
County of New York, ss:

T. M. Lee Martin, being duly sworn, says:

I am Secretary of Gaston, Williams & Wigmore, of Canada, Ltd., defendant herein.

I have read the foregoing answer and the same is true of my own

knowledge except as to those matters stated to be alleged on information and as to those matters I believe it to be true.

The sources of my knowledge and the grounds of my belief are derived from negotiations and communications of the plaintiff and reports of officers and employees of the defendant.

The reason this verification is not made by the defendant is that it is a foreign corporation.

T. M. LEE MARTIN.

Sworn to before me this 2nd day of March, 1918.

[SEAL.] THERESE FLOWITCH,
Notary Public, New York Co.

Co. Clerk No. 76, Register No. 8062.

15 *Amended Answer.*

United States District Court, Southern District of New York.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant.

The defendant, Gaston, Williams & Wigmore of Canada, Ltd., by Kirlin, Woolsey & Hickox, its attorneys, for its amended answer herein, alleges as follows:

For an Answer to the First Cause of Action.

First. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of the complaint.

Second. It admits the matters alleged in the second paragraph of the complaint, except that it denies that it has an office for the transaction of business in the Southern District of New York.

Third. It admits that at the times mentioned in the com-
16 plaint the defendant was the owner of the British steamship Eskasoni; and that on the 11th and 12th days of December, 1916, and for some time prior thereto had offered said vessel for sale; and that on the 11th and 12th days of December, 1916, the defendant agreed with the plaintiff that if the plaintiff should secure a purchaser for the said vessel at the price of $475,000, the defendant would pay to the plaintiff the sum of 2½% of such purchase price for his services. Thereafter plaintiff procured Philip Templeman and George A. Moulton, as purchasers of the said vessel, who thereupon began negotiations for the charter and purchase of the vessel and who thereafter attempted to enter into a contract for the purchase and charter of said steamship from the defendant at the purchase price of $475,000. It denies the other matters alleged in the third paragraph of the complaint.

Fourth. It denies all the matters alleged in the fourth paragraph of the complaint.

Fifth. It admits the matters alleged in the fifth paragraph of the complaint.

For an Answer to the Second Cause of Action.

Sixth. The defendant repeats and realleges the allegations contained in paragraphs first and second of the answer to the first cause of action.

17 Seventh. It admits the matters alleged in the seventh paragraph of the complaint.

Eighth. It denies all the matters alleged in the eight paragraph of the complaint.

Ninth. It admits all the matters alleged in the ninth paragraph of the complaint.

Tenth. Further answering and as a further and separate defense to the first and second alleged causes of action, and repeating and realleging all the denials and allegations contained in Paragraphs First to Ninth, inclusive, of this answer, defendant alleges:

At the time the alleged contract for the purchase and charter of the Steamship Eskasoni was entered into with Gaston, Williams & Wigmore of Canada, Ltd., Philip Templeman and George A. Moulton, parties to the contract, were subjects of the Kingdom of Great Britain and Ireland and residents of the Crown Colony of New Foundland. The parties to the contract were British subjects and subject to the laws and commands of the Government of Great Britain.

Section 39-cc of the British Defense of the Realm Regulations, provides as follows:

"39cc. A person shall not without permission in writing from the Shipping Comptroller, directly or indirectly and whether on his own behalf or on behalf of or in conjunction with any other person, purchase or enter into or offer to enter into any agreement or any
18 negotiations with a view to an agreement for the purchase of any ship or vessel.

"If any person acts in contravention of this regulation or if when any permission of the Shipping Comptroller has been granted under this regulation subject to any conditions, the person to whom it was granted fails to comply with any such conditions, he shall be guilty of an offense against these regulations."

The attempted contract for the charter and sale of the Steamship Eskasoni alleged in the complaint, contained among others the following provision:

"Twelfth. Licenses and Permits—The charterers agree to procure from the British or Dominion Governments or the Government of Newfoundland, as may be necessary, any licenses or permits which

may now be or which may hereafter become necessary as a condition of entering into any trade in which Charterers may wish to employ the said steamship, and to comply in all respects with the said licenses and permits and with any laws and governmental proclamations, rules, regulations and/or restrictions which may be applicable to the said steamship as a British steamship."

The attempted purchasers, Philip Templeman and George A. Moulton did not obtain from the Shipping Comptroller permission to buy or charter the vessel as provided in the contract and as provided under the British Defense of the Realm Regulations as set forth above.

19 After the said contract was attempted to be entered into the British Government issued orders to the defendant, prohibiting it from chartering or selling the vessel to Philip Templeman or George A. Moulton.

Therefore, not by reason of any default on the part of the defendant, but by reason of the act of the British Government and under the provisions of Section 39*cc* of the British Defense of the Realm Regulations, the charter party and agreement to sell the vessel became entirely void and unenforceable ab initio and the defendant was discharged from any liability to the plaintiff for commissions as alleged in the complaint.

Eleventh. Further answering and as a second further and separate defense to the first and second alleged causes of action, and repeating and re-alleging all the denials and allegations contained in Paragraphs First to Ninth inclusive of his answer, defendant alleges, on information and belief:

That at all the times mentioned in the complaint there was, and is now, a well-known usage and custom existing in the shipping business at the port of New York, that commissions under an agreement made between a ship broker and a shipowner to pay to the broker securing a charter commissions on the gross amount of the charter, do not become due and payable except as when hire is paid by the charterer to the owner, and if during the charter period the charter comes to an end in pursuance of its terms without fault on

20 the part of the shipowner, or if the shipowner rightfully cancels and terminates the charter party, the commission due from hire which the broker would have received if it had been earned ceases as of the date of such cancellation. The usage and custom of the port of New York as above set forth was incorporated in the agreement for commissions herein. There was not any purchase money paid to or charter hire earned by defendant under the above mentioned attempted contract for chartering or selling the steamship Eknsoni. Wherefore, defendant is discharged from any liability if such exists to the plaintiff for commissions.

Wherefore, defendant demands judgment that the complaint herein be dismissed with costs to it against the plaintiff and for such other and further relief as may be just.

KIRLIN, WOOLSEY & HICKOX,
Attorneys for Defendant.

Office & P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

21 STATE OF NEW YORK,
County of New York, ss:

T. M. Lee Martin, being duly sworn, says:
I am Secretary of Gaston, Williams & Wigmore of Canada, Ltd., defendant herein.
I have read the foregoing amended answer and the same is true of my own knowledge except as to those matters stated to be alleged on information and as to those matters I believe it to be true.
The sources of my knowledge and the grounds of my belief are derived from negotiations and communications of the plaintiff and reports of officers and employees of the defendant.
The reason this verification is not made by the defendant is that it is a foreign corporation.

T. M. LEE MARTIN.

Sworn to before me this 28th day of January, 1920.
LILY A. REDSTONE,
Notary Public.

Bronx Co. No. 47.
Filed *on* N. Y. County No. 327.

22 *Extract from Minutes.*

At a Stated Term of the District Court of the United States, for the Southern District of New York, Held at the United States Court Rooms, in the U. S. Court House and Post Office Building in the Borough of Manhattan, City of New York, on the 9th Day of February, in the Year of Our Lord One Thousand Nine Hundred and Twentieth.

Present: Honorable John C. Knox, District Judge.

L. 18/85.

PHILIP A. WARNER

against

GASTON, WILLIAMS & WIGMORE.

Now comes the plaintiff by Jos. P. Nolan, his attorney, and moves the trial of this cause. Likewise comes the defendant by Kirlin, Woolsey & Hickox, its attorneys, and Cletus Keating of Counsel. Thereupon a jury is duly impaneled and sworn and the cause pro-
ceeds to trial. After hearing the evidence for the respective
23 parties, the arguments of counsel and the charge of the Court, the jury, on Wednesday, February 11, 1920, retire in charge of an officer duly qualified to attend them and upon their return render a special verdict for the plaintiff.

Defts.' motion to set aside the verdict, denied.
Plff.'s Atty. moves for a direction of a verdict. By direction of the Court, Verdict for the plff. for $11,750.00 and interest from March 12, 1917.
Deft. excepts.
Deft.'s Atty. moves to set aside the verdict. Denied. Exc.
Execution stayed thirty days after entry of judgment.
An extract from the minutes.

ALEX. GILCHRIST, JR.,
Clerk.

24 *Judgment.*

United States District Court, Southern District of New York.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant.

The issues in this cause having been duly brought on for trial before the Hon. John C. Knox, District Judge, and a jury, at a Stated Term of this Court, held at the Court Rooms in the Post Office Building, in the Borough of Manhattan, City of New York, in and for the Southern District of New York, on the 9th, 10th and 11th days of February, 1920, and the plaintiff appearing by Joseph P. Nolan, Esq., his attorney, and the defendant appearing by Messrs. Kirlin, Woolsey & Hickox, its attorneys, and the issues having been duly tried; and after hearing the evidence on behalf of the plaintiff, and the evidence on behalf of the defendant, and the Court having duly charged the jury, and the jury having rendered its special verdict in favor of the plaintiff, and the plaintiff having moved for the redirection of a verdict in favor of the plaintiff, and the
25 Court having then directed the jury to bring in a verdict for the plaintiff, with interest from March 12th, 1917, and the jury, on the 11th day of February, 1920, having rendered a verdict for the plaintiff in the sum of $11,750.00, with interest thereon at the rate of 6% per annum from the 12th day of March, 1917, amounting to the sum of $2,056.25, and interest on said verdict from February 11, 1920, to March 10, 1920, amounting to $56.78, amounting in all to the sum of $13,863.03, and the costs of the plaintiff having been duly adjusted at the sum of $223.60,

Now, on motion of Joseph P. Nolan, attorney for the plaintiff, it is Ordered and adjudged that the plaintiff have judgment against the defendant herein upon the merits, and have and recover of and from the defendant Gaston, Williams & Wigmore of Canada, Ltd., the sum of $14,083.63 judgment, interest and costs, as adjusted, and that the plaintiff have execution accordingly. Judgment this 8th day of March, 1920.

ALEX. GILCHRIST, JR.,
Clerk.

26 *Bill of Exceptions.*

United States District Court, Southern District of New York.

Before: Hon. John C. Knox, J., and a Jury.

PHILIP A. WARNER, Plaintiff,

vs.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant.

New York, February 9, 1920.

Appearances:

Joseph P. Nolan, attorney for plaintiff.
Kirlin, Woolsey & Hickox, attorneys for defendant, by Cletus Keating, L. de Grove Potter, of Counsel.

A jury was impaneled and sworn.
Adjourned to Tuesday, February 10, 1920, at 10:30 A. M.

27 New York, February 10, 1920.

Opening for Plaintiff.

Mr. Nolan: May it please the Court and gentlemen of the jury: This action is brought by Philip A. Warner against the corporation, Gaston, Williams & Wigmore, to recover the sum of $11,750, the balance due of commission. Yesterday in explaining the case to you I said $11,625. The full commission was $11,875, and $125 was paid on account so that the amount for which we sue is $11,750. The facts which the plaintiff will establish by his evidence are that in 1916 Mr. Warner, who was a civil engineer by profession had engaged in efforts as a broker for the purchase and sale of steamships. He was introduced to the firm of Gaston, Williams & Wigmore, or rather the corporation, and he did various work for them for a period of five or six months and in December, 1916, they gave him a letter authorizing him to offer for sale the British ship Eskasoni for $475,000, the terms of the purchase and sale of the ship to be agreed upon if he found purchasers. That was on the 11th of December, 1916, and they agreed to pay him a commission of 2½ per cent on the purchase price.

After looking around he finally introduced to them George Moulton and Philip Templeman, and in the office of Gaston, Williams & Wigmore, the terms for the purchase of the ship were agreed on and a contract was written in Gaston, Williams & Wigmore's office setting forth the terms of purchase. $5,000 was paid on account by
28 Moulton and Templeman and from that $5,000 Gaston, Williams & Wigmore paid to Mr. Warner $125 that was 2½ per cent upon the first sum of money paid for the purchase. Afterwards, for reasons which may develop on the trial, Gaston, Williams

& Wigmore and Moulton and Templeman, on an agreement between themselves cancelled the contract and Gaston, Williams & Wigmore refused to pay Mr. Warner the balance of the money which we claim he earned when he found the purchasers and had performed the work for which he was hired, and if we establish these facts we will ask you to give us a verdict for $11,750.

Opening for Defendant.

Mr. Keating: May it please the Court and gentlemen of the jury: Mr. Nolan has very fairly, I think, sketched out in substance the facts, with the exception that he left out a few.

We do not deny that we made an agreement with this gentleman, Mr. Warner, to pay him a commission of 2½ per cent, provided he secured a purchaser to sell the steamship Eskasoni. The difficulty with the provision is that he did not procure a purchaser. It is true he procured two men who signed the contract, but these men for reasons which will be pointed out on the trial were incapable of purchasing. A man cannot be a purchaser unless he is able to buy something.

We are going to show that this contract which was signed
29 by Moulton and Templeman and Gaston, Williams & Wigmore, was absolutely illegal and void and of no effect whatsoever. If that is so, we believe the Court should instruct you gentlemen that the verdict should be for the defendant.

Mr. Nolan: Mr. Warner, take the witness stand.

PHILIP A. WARNER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. Where do you reside, Mr. Warner?
A. New York City.
Q. Are you a citizen of the State of New York?
A. Yes, sir.
Q. And of the United States?
A. Yes, sir.
Q. What is your profession?
A. I am a civil engineer.
Q. And what is your present occupation?
A. I have connection with a shipping board, the Emergency Fleet Corporation.
Q. In the Philadelphia office or New York?
A. In Philadelphia. My active service is just ceasing there.
Q. In 1916 did you engage in any other business than that of civil engineer?
A. Yes, sir, I was in the ship brokers business.

Q. Did you know the defendant corporation, Gaston, Williams & Wigmore?

A. Yes, sir.

30 Q. Did you have any business dealings with them in the year 1916?

A. Yes, sir.

Q. Over what period of time?

A. From the summer of 1916 through the part of the summer of 1917.

Q. Did you call at the office of Gaston, Williams & Wigmore in December, 1916?

A. Call at the office, yes, sir, many times.

Q. Who did you see there?

A. Mr. Austin, Vice President of Gaston, Williams & Wigmore and Mr. Lee Martin, Secretary of Gaston, Williams & Wigmore.

Q. Did you receive a letter from Gaston, Williams & Wigmore concerning the steamship Eskasoni at any time in December, 1916?

A. Yes, sir.

Q. I show you this letter and ask you if you received that from the defendant?

A. Yes, sir.

Mr. Nolan: I would like to offer this in evidence.

Received and marked Plaintiff's Exhibit 1 and read to the jury.

Mr. Keating: I will read it to the jury.

(Exhibit No. 1 read to the jury.)

Q. What did you do, Mr. Warner, after you received that letter?

A. I started out to find purchasers.

Q. Did you introduce anybody to Gaston, Williams & Wigmore to discuss the proposed purchase of the Eskasoni?

A. Yes, sir, after I had interested two gentlemen I later took them to the office of Gaston, Williams & Wigmore.

Q. And who were they?

A. Mr. Philip Templeman and Mr. George Moulton.

31 Q. Who did you introduce them to?

A. I introduced them to Mr. Austin, Vice President of Gaston, Williams & Wigmore, and Mr. Martin, Secretary of Gaston, Williams & Wigmore.

Q. And did they afterwards enter into an agreement in writing with Gaston, Williams & Wigmore?

A. Yes, sir.

Q. I show you a document and ask you if that is the contract?

A. Yes, sir, that is the original contract.

Mr. Nolan: I offer it in evidence.

Received in evidence and marked Plaintiff's Exhibit No. 2.

Mr. Keating: Don't you think at this time we ought to make a note that the date on that contract is not correct? I think it was some time in April.

Mr. Nolan: I think we got time although it was the 12th.
The Court: Can you specify the date on which it was signed in December?

Q. Can you tell when this was signed, Mr. Warner?
A. Yes, sir, it was signed on March 11, 1917.
Q. And you had been frequently to the office of Gaston, Williams & Wigmore between December 11 and March 11 in connection with this proposed contract?
A. Yes, sir. There had been a great many changes in preparation of that contract. Then it was finally agreed upon and signed.
Q. And it was prepared in Gaston, Williams & Wigmore's office?
A. Yes, sir.
32 Q. Do you know who prepared it?

Mr. Keating: I object to that.
The Court: Unless it is material.
Mr. Nolan: I will withdraw it. It is immaterial.

"This Charter-Party made and concluded in the City of New York on the twelfth day of December, 1916"—but it really was signed on March 11th—"between Gaston, Williams & Wigmore of Canada, Limited, a corporation of the Dominion of Canada, having its principal office in Toronto, Ontario, hereinafter called the 'Owner,' the owner of the British screw steamship Eskasoni of St. Johns, Newfoundland, and Philip Templeman and George A. Moulton, subjects of the Kingdom of Great Britain and Ireland"——

Then the contract merely gives the details and the size of the boat.

"Whereas, the Owner has agreed to charter and sue the steamship Eskasoni for $475,000 to be paid to it, or to its owners by the terms of this Charter Party"——

Terms of payment: "Charterers agree to make payments to the owner in United States gold or its equivalent at the office of its agent, Gaston, Williams & Wigmore, a steamship corporation, 120 Broadway, Borough of Manhattan, New York City, for the
33 use and hire of the steamship Eskasoni for the said period as follows: Five thousand dollars (5,000), on the signing of this Charter Party. (*b*) Twenty thousand dollars ($20,000) within seven (7) days after said steamship shall have left Liverpool, notification whereof shall be in writing and shall be given to the Charterers. (*c*) One hundred and Seventy-five thousand ($175,000) on the completion of the loading for her first voyage from the Port of New York."

And then the agreement provides that the ship must be seaworthy and so forth, $137,500. 140 days after notice to the Charterers that said vessel is ready to receive cargo for the first trip, $137,500. 240 days after notice to the Charters as provided in sub-divisions thereof.

Then it provides for the usual insurance indemnity for the Charterers, and so forth and on the fulfillment of the payments as provided the ship shall be delivered with the bill of sale to Moulton and Templeman.

Q. Was anything paid on account on this contract by Moulton and Templeman?
A. Yes, sir.
Q. How much?
A. $5,000, the day the contract was signed.
Q. Was anything paid to you?
A Yes, sir.
Q. How much?
A. $125 which was 2½ per cent of the $5,000.
Q. Have you figured what 2½ per cent of $475,000 is?
A. Of what amount?
Q. 2½ per cent of $475,000?
A. Yes, sir.
34 Q. How much?
A. $11,875.
Q. And how much money is still due you?
A. $11,750.
Q. Have you made a demand for that sum of money?
A. Yes, sir.
Q. Have you received it?
A. No, sir.

Cross examination.

By Mr. Keating:

Q. Mr. Warner, what was the flag of the Eskasoni?

Mr. Nolan: That is objected to. It is immaterial and the contract does not even show what the flag is. It calls it a ship but it does not say British, American or anybody else.
The Court: I will allow you to show.
Mr. Nolan: Exception.

A. The ship Eskasoni was registered in Newfoundland.
Q. Under the British flag?
A. Under the British flag.
Q. And flew the British flag I suppose?
A. As far as I know she did.
Q. Do you know the nationality of Mr. Moulton and Mr. Templeman?
A. They are natives of Newfoundland.
Q. Was the Eskasoni actually sold to these gentlemen?
A. Yes, sir.
Q. Was it actually delivered to them?
A. No, sir.
Q. Did they actually pay the balance of the $475,000?

35 Mr. Nolan: If you know.
Mr. Keating: Well, now, this is cross examination. I much prefer not to be interrupted.

Q. (Question repeated.)

Mr. Nolan: That is also objected to.
The Court: I will allow it.

A. They didn't actually pay because they were not permitted to.
Q. Were not permitted to by whom?
A. By Mr. Austin, of Gaston, Williams & Wigmore.
Q. You mean he would not take the money?
A. I mean he had written a letter sending the check back.
Q. Did Moulton and Templeman take the check back, do you know that?
A. They received it. They did not accept it in good grace, no, sir.
Q. What do you mean they did not accept it in good grace, they took it and put it through the bank?
A. When they sent it through the mail they received it.
Q. Did they return it?
A. I do not think they did.
Q. In other words, they accepted back the $5,000, is that right?
A. No, they never accepted it. They received it but they never accepted it.
Q. What did they do with it?
A. Well, I don't know. I guess they kept it for a while and then by this time, some time they must have cashed it.
36 Q. Why not be frank with me?
A. I am telling you everything I know about it.
Q. Now, were you present when any discussion took place between Messrs. Moulton and Gaston, Williams & Wigmore, with respect to calling off this business?
A. Yes, sir.
Q. Do you recall having any conversations yourself, indulging in any part of the conversations yourself?
A. Yes, sir.

Mr. Nolan: So that I will not be interrupting all the time, I would like to state one objection to this line of questioning as incompetent.
The Court: Overruled.
Mr. Nolan: Exception.

Q. What did you say to Mr. Austin and what did he say to you?
A. Regarding what?
Q. Regarding this transaction?
A. Would you be kindly a little more explicit.
Q. Now at the time you were present and you were discussing the calling off of this business?
A. I never discussed it. I was present.
Q. You had nothing to say about it at all? You just sat there?
A. I visited Mr. Austin on other business and incidently this subject came up. He and I were there alone on several occasions.
Q. You know, Mr. Warner, that the British Consul forbade this transaction?
A. No, I don't know that.

Q. Is it within your knowledge that Mr. Moulton and Mr. Templeman were on the British blacklist?

A. No, sir, it was not.

37 Q. The dissatisfaction which the British Government had with these gentlemen was the reason which was discussed at that meeting at which you were present for this calling this thing off, was it not?

A. I was not at a meeting where the thing was all off.

Q. I said where the calling it off was discussed, Mr. Warner?

A. It was not. The calling off was not discussed, no.

Q. You did not hear Mr. Austin say at that time when you were present that the British Government would not agree to this thing?

A. No.

Q. You never heard that?

A. I heard Mr. Austin make other remarks. I never heard him make that remark.

Q. Well, in substance, that is what he said.

A. He said there was some question by the British Consul regarding Mr. Moulton.

Q. And what did Mr. Moulton have to say about it?

A. He never said anything to me about it.

Q. Did Mr. Templeman say anything to you about it or in your presence?

A. Yes.

Q. Did you hear either of these gentlemen at this time, I mean the time when the calling off of the going ahead with this contract was discussed, did you hear Mr. Moulton or Mr. Templeman say that they had some difficulty with the British Government?

A. Yes, and when I was in their office on one occasion I think I heard some discussion about it.

Q. As a matter of fact, you know they were not satisfactory to the British Government, isn't that so?

38 A. I knew that Mr. Moulton for some reason on account of some previous deal or something was in a way——

Q. We were at war or at least Great Britain was at war with Germany at this time, were they not?

A. Yes, sir.

Q. Now this negotiation, this contract which was signed by the parties, which has been put in on your behalf as Exhibit No. 2 contained a provision, did it not—of course, I can refer to it but you know it does contain a provision about securing the permission of the British Government?

A. No, sir.

Q. You were not aware of that?

A. No, sir.

Q. Were you present when it was signed?

A. Yes, sir.

Q. Read over in your presence, was it? You never read it at all?

A. Oh, I had occasion to read it a number of times but I think it was changed about a dozen or fifteen times before it was signed.

Q. Now, Mr. Warner, on page 24 of the record, cross examination

of your testimony on the previous trial at the very end of the statement you make the following statement—well I will read you the whole question starting at page 23:

"Q. Do you read the newspapers when you see things about shipping?

A. No, sir, I had no knowledge of the bunkering agreement, and never heard of it until only recently.

"Q. Now you knew and I think perhaps I can ask you to admit it, you knew that Great Britain was at war with Germany at that time, didn't you?

A. Yes, sir, I did.

39 "I did not know perfectly well that they could not get permission to transfer that ship in war time to anybody that they suspected of being an alien enemy. There was not the slightest suspicion about that thing either on my part or on the part of the company of Gaston, Williams & Wigmore, Ltd., until the deal was made and the contract was signed and the payment was made and my commission was paid, and it was some time afterwards. I did not think that Gaston, Williams & Wigmore would be satisfied if I should bring some German emissary who was ready and willing to pay for any, buy all the English ships on the sea. I did not think I would earn a commission by doing that. I would assume now that there were some limitations on the sort of people that I had a right to take in under my contract with them. I have read and studied this agreement that I am suing for having brought about."

Q. Now, you told me just a minute ago—I do not want to make a point of it—you told me you never read the agreement, didn't you? I notice in this last paragraph you now say you testified on a previous trial you not only read it but studied it?

A. I have read the contract, yes, but I say the contract was changed a number of times.

Q. You say, "I have read and studied the agreement that I am suing for having brought about." Now, I am talking about
40 Exhibit 2 which is the contract; you say, you told me a while ago, you never read it. Now I point out to you on the first trial you said you not only read it but studied it?

A. I read the contract a number of times but Mr. Moulton met Mr. Martin a number of times in connection with this matter and there were many changes made in it, so that it was possible there was some changes made that I was not familiar with from day to day.

Q. Now, in substance, your suit here, as you testified on the first trial, is for having procured this contract which has been offered in evidence as Plaintiff's Exhibit No. 2. That is your case, isn't it?

A. Yes, sir.

Q. Now, in the first trial you conceded that if you produced two Germans in war time who had affixed their valuable signatures to a document of this kind you would not have been entitled to your commission, didn't you?

A. Certainly.
Q. Well now, suppose you had produced two lunatics?

The Court: I say that is arguing with the witness.
Mr. Keating: Well, I will withdraw the question.

Q. In other words, Mr. Warner, you recognized that you had to have, you had to produce somebody who was not only ready and willing but who was able to buy?

Mr. Nolan: I object, if your Honor please.
41 The Court: I think I will sustain the objection to that.
Mr. Keating: I take an exception.
The Court: That is what he was required to do under the law to produce willing buyers at that time.
Mr. Nolan: And when they were accepted by the seller and the contract was signed, the contract was ended.
The Court: Unless he was a party to some other agreement.
Mr. Keating: I take an exception.

Q. Now you have testified on the first trial that so far as you were concerned and so far as Gaston, Williams & Wigmore were concerned, when they signed this contract, you and they were innocent as to Mr. Moulton and Mr. Templeman being on the blacklist, if they were on the blacklist, isn't that so?
A. Yes, sir. Gaston, Williams & Wigmore knew all about the gentlemen. They had no hesitancy in signing the contract with them.
Q. I am asking you a different question. You testified on the first trial, as I understood you, you testified here that yourself and Gaston, Williams & Wigmore entered into this thing in good faith without any knowledge that these fellows were on the blacklist?

Mr. Nolan: Where is that in the testimony of the last trial?

Q. Now let me ask you this question and if I have misstated it, we will go back to that testimony?
42 A. I have no knowledge of their being on the blacklist.
Q. Well, suppose I say "unsatisfactory to the British Government"?
A. I have no knowledge that they were unsatisfactory.
Q. And either did Gaston, Williams & Wigmore, so far as you know?
A. Not at the time the contract was signed.
Q. Not at the time the contract was *contract*?
A. That is it.

Redirect examination.

By Mr. Nolan:

Mr. Nolan: Just one question I think I omitted to ask the witness.

Q. After you received the letter of December 11 or at the time you received it was there anything said as to the compensation you should have between Mr. Austin and yourself?

A. Yes, sir, he said he would pay me 2½ per cent of the purchase price.

Mr. Nolan: That is the plaintiff's case, if your Honor please.

Mr. Keating: I move to dismiss, if your Honor please, on the ground that the plaintiff has not made out a case.

The Court: Motion denied.

Mr. Keating: Exception.

43 JOHN B. AUSTIN, JR., called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Austin, what is your position?

A. Vice-President and General Manager of the Gaston, Williams & Wigmore Steamship Corporation, and Gaston, Williams & Wigmore, of Canada, Limited.

Q. How long have you held that position?

A. Since April 20, or within a day or two of there, 1916.

Q. Which one of those companies is the owner of the Eskasoni?

A. Gaston, Williams & Wigmore, of Canada, Limited, was the owner of the steamship Eskasoni.

Q. Is she a British flag steamer? Was she registered?

A. Yes, she was registered at St. Johns, Newfoundland.

Q. You know Mr. Warner, the plaintiff?

A. I do.

Q. You don't make any question but what you wrote him that letter, agreeing to pay him the commission if he arranged the sale?

Mr. Nolan: That does not mention commission, Mr. Keating.

A. I certainly wrote the letter (referring to Plaintiff's Exhibit 1).

Q. Now after this contract, Exhibit 2, which is the contract for sale was executed, what did you do; I mean, with respect to
44 transferring the ship?

A. I went down to the British Consulate's office here in New York to ascertain if there was any objection to the transfer being made or the contract being entered into, to get the approval of the British authorities to the contract.

Q. Did you secure his approval?

A. No.

Q. Did you ask him for his approval?

A. Yes.

Q. And what did he do to that request?

Mr. Nolan: Now, if your Honor please, I object to it as incompetent.

The Court: I suppose it goes to what the fault was in carrying out the contract.

Mr. Nolan: That would affect the plaintiff in this case.

The Court: I will allow him to show this.

Mr. Nolan: Exception.

Q. And what did he do to that request?

A. Well, he said that it could not be approved.

The Court: I suppose it is incompetent as it is hearsay.

Mr. Keating: You see, your Honor, it is not hearsay because it shows that he did.

The Court: You did not get the approval?

The Witness: I did not get the approval.

45 Mr. Nolan: There is a way to prove the form on that.

Q. Now, after you were unable to get the approval of the British Consul did you have any communications with Mr. Moulton and Mr. Templeman at which Mr. Warner was present?

A. I can't say as to that.

Q. Well, was the matter of going on with the contract discussed with Mr. Moulton or Mr. Templeman in Mr. Warner's presence so far as you recollect?

A. I cannot recollect that.

Q. Well, at any rate it was discussed with Mr. Moulton and Mr. Templeman?

A. It certainly was discussed with Messrs. Moulton and Templeman.

Q. Now, what happened to the steamer? Was she actually sold and delivered to these gentlemen?

A. No.

Q. Well, tell me what happened?

Mr. Nolan: That is objected to as incompetent and irrelevant.

The Court: I will allow him to show what happened to the steamer which was never delivered.

A. I told Messrs. Moulton and Templeman what the situation was and the check for the first payment made on account was returned and deposited, that check, and I considered that the deal was off as far as they were concerned.

Q. Messrs. Moulton and Templeman never made any further demand on you under that contract?

A. Mr. Templeman.

46 Q. Well, never mind about Mr. Templeman.

A. You asked me whether Mr. Moulton or Mr. Templeman.

Q. Jointly?

A. No, not jointly.

Q. I show you a letter which purports to be a letter from you to Mr. Templeman and Mr. Moulton, dated April 12, 1917, and ask you if that is your letter?

A. Yes, that is my letter.

Q. That was the letter — which you enclosed your check, is that right?
A. It says so.
Q. Well, did you enclose your check?
A. Well, I cannot remember the enclosing of the check. It is usually made by one of the boys, and not by myself personally.
Q. Well, did you ever see the cancelled stub of the check?

Mr. Keating: Is there any question he received back this money? Mr. Moulton and Mr. Templeman testified to that at the last trial.
Mr. Nolan: There is not any question that letter was received by them and they received the check but we deny of course that is any adjudication against the plaintiff.
I object to this as incompetent.
The Court: I will allow it.
Mr. Nolan: Exception.

Received and marked Defendant's Exhibit A.

Q. Did you have a conversation with Mr. Warner with respect to that $5,000 that had been paid on account to you?

47 Mr. Nolan: Will you fix the time of that conversation please?
Mr. Keating: First of all I will withdraw that question.

Q. First of all, Mr. Austin, you were paid by Moulton and Templeman $5,000 which was the initial deposit? Wasn't that the fact?
A. Yes, some amount like that. It was supposed to represent that, $5,000. It was a question of exchange and some other things.
Q. Now on that you actually testified you paid $125 to him?
A. Yes.
Q. Now, did you after this contract was not gone ahead with, did you have a discussion with Mr. Warner with respect to that $125?

Mr. Nolan: I object to it as incompetent and not within the period of time asserted in the transaction.
The Court: I will allow him to say it.
Mr. Nolan: Exception.

A. I did.
Q. Will you please state what the conversation was?

The Court: The objection goes to that also.
Mr. Nolan: Thank you.

Q. But I told Mr. Warner it was unfortunate the deal had fallen through and I said "I guess you owe me $125, owe us."
Q. What did he say?
A. He remarked simply, "Well, it looks something like
48 that; it looks that way too." But I never pressed him to return it.
Q. Well now, Mr. Austin, how long have you been in the steamship business in New York?

A. In New York let me see, oh, about 1911, somewhere around there.

Q. Are you familiar with the general customs of the port with respect to brokers on the sale of ships?

A. Yes.

Q. How many transactions have you been in or been engaged in since you have been in New York. Approximately, I do not expect you to give the exact number?

A. I suppose about, conservatively, ten at least.

Q. And you make it a business to keep yourself posted on those things?

A. I try to.

Q. Will you please tell us, Mr. Austin, first of all if there exists any general custom in the port of New York as to whether a broker on the sale of a ship receives his commission if the sale does not go through? The first question is whether there is such a general custom?

Mr. Nolan: I object to that, if your Honor please, as incompetent. No question that might prevail can be binding where there has been a specified contract and the custom would not be binding where it is not shown to have been known to the plaintiff.

The Court: Well, that is a question of law, I suppose, as to what it is. I will allow him to say whether there is a custom or not.

Mr. Nolan: Exception.

49 Q. Just say whether there is or is not a custom in that respect?

A. There is a custom, yes.

Q. And will you tell us what the custom is?

Mr. Nolan: Same objection.

The Court: Same ruling.

Mr. Nolan: Exception. I would also like to state in the objection, if your Honor please, here is a case where it is quite evident by the terms of the contract and by what transpired that the defendant and the buyers avoided the contract. Now, there never could be a time when the custom could apply to Warner.

The Court: It may be a question whether or not when he made this contract he was bound by the existence of the custom and was entitled to be subject to the custom.

Mr. Nolan: Exception.

Q. And will you tell us what the custom is?

A. The custom, a custom in the port of New York on such transactions is that the brokerage is paid on the amount of money received.

Q. And if no money is received?

A. No brokerage.

Mr. Nolan: Same objection.

Q. Will you say that that custom is generally known to steamship brokers?

50 Mr. Nolan: That is objected to as incompetent.
The Court: I will allow him to say.
Mr. Nolan: Exception.

A. No. I cannot answer that question.
Q. It is known to you at any rate?
A. Yes.
Q. And have you ever had any transactions in which an agreement or what was purported to be an agreement was made and then it fell through and no brokerage was paid or demanded?

Mr. Nolan: That is objected to.
The Court: Yes, I think that is specific.
Mr. Keating: I will withdraw the question.

Cross-examination.

By Mr. Nolan:

Q. Are you an officer of the various corporations that bear the title Gaston, Williams & Wigmore in one form or another?
A. No.
Q. Only in the Canadian Company?
A. In the American Steamship Company.
Q. How many of the Gaston, Williams & Wigmore corporations are there?
A. I don't know.
Q. How many do business in the same office of Gaston, Williams & Wigmore of Canada?
A. The steamship corporation is the only one, the Gaston, Williams & Wigmore Corporation, the American Company looks after the affairs of Gaston, Williams & Wigmore of Canada, Limited.
Q. And you are only an officer then of the Canadian Company?
A. Of the Gaston, Williams & Wigmore Corporation, the
51 American Steamship Company.
Q. Are you an American citizen?
A. I am.
Q. Where was the Eskasoni at the time this contract was made?
A. I think she was in Liverpool.
Q. And the further payments by Templeman and Moulton were not to be made until she arrived here in New York.
A. May I see that contract?

(Contract handed to witness).

The Witness (continuing): Yes.

Q. When did she get to New York after the signing of this contract, Plaintiff's Exhibit 2?
A. I cannot answer that question without consulting my records. I can give you an approximate date.
Q. Well, give us an approximate date.

A. I do not even remember her coming to New York. My recollection is she went to Philadelphia from Liverpool.

Q. My information is she went there in the middle of July?

A. Sometime in the middle of the summer.

Q. Then she did not come to New York at all?

A. I do not recollect her coming to New York again.

Q. Of course then she got to this country from England after you and Moulton and Templeman had called off the contract?

A. Yes.

Q. And there was no occasion even if you had not called off the contract for Moulton and Templeman to make these further payments was there as the ship did not get here?

52 A. No.

Q. And you never gave Moulton and Templeman the notice that this contract provides you should give so that the second payment would start?

A. The ship reached—there is another proposition in there——

Q. Before we come to that, I asked you if Gaston, Williams & Wigmore has even given Moulton and Templeman the notice that this contract provides for making the second payment?

A. Not that I recall of.

Q. Now are you quite sure that at no time after you returned the check of $5,000 with your letter of April 12, Exhibit A, that at no time had Mr. Templeman and Mr. Moulton called together?

A. I really cannot say that. Mr. Moulton came to see me; Mr. Templeman came to see me. They may have come together, but I cannot remember. I had a great many things to go through at that time.

Q. Well, this was rather an important transaction, wasn't it?

A. I would differentiate all those things. It was until it fell through. Then it was water over the dam.

Q. Isn't there anything about a transaction of this kind that would refresh your mind whether these two gentlemen came to you certaining that $5,000?

A. I can only state that I remember seeing both these gentlemen; whether they came together after that, I do not know.

Q. Was there any suggestion made at any of these interviews there between yourself and Moulton and Templeman that if before the ship got to New York Moulton or Templeman had cleared—this is not from any supposed charges that were against them—

53 that then they could have the contract and the contract carried through?

A. There was such a suggestion made. Let me see if I can recall it. I think my recollection is that Mr. Moulton wanted, stated that he would withdraw from the transaction and let Mr. Templeman attempt to get his skirts clear with the British authorities and then to take the negotiations up again.

Q. Was there any agreement on your part representing Gaston, Williams & Wigmore that that could be done?

Mr. Keating: Now, if your Honor please I object to that for the reason that the contract is here being sued on as the contract with

Moulton and Templeman. There is on suggestion about any contract that could have been made with Templeman.

The Court: No, but they are pretty closely allied. Objection overruled.

Mr. Keating: Exception.

Q. (Question repeated.)

A. My recollection of the proposition is that I told either Mr. Moulton or Mr. Templeman or probably both of them that we were willing to sell the boat and if things could be straightened out we would be glad to sell the boat but there was not much use discussing it while they were in their present position.

Q. Then they had under that arrangement really from April 12, 1917, the day you returned the check, until the ship got here
54 in July or rather got to Philadelphia in July to take up any necessary measures towards straightening out this situation?

A. I would not say that because the contract provided that the seller, the parties to the transaction must be satisfactory to the British authorities.

Mr. Nolan: Now I move to strike that out as the contract does not provide any such thing in the first place and it is not responsive in the second.

The Court: Yes.

Mr. Keating: Now, just a minute. I want to make an objection at this time. This line of testimony is competent for the reason that we will establish that not only was this contract illegal and void under the British law but any negotiations looking to the purchase of a British ship was illegal and void under the Defense of the Realm Act and therefore not only a written contract looking to the purchase but any negotiations looking to the purchase were illegal and void also. I make an objection on that ground.

The Court: Objection overruled.

Mr. Keating: Exception.

Q. (Question repeated).

A. I do not understand your question.

Q. You have testified that after the sending of Defendant's Exhibit A, that is your letter of the 12th of April, with the $5,000 to Moulton and Templeman that you did have talks with both Moulton and Templeman either together or separately and suggested that
55 Gaston, Williams & Wigmore were willing to sell the boat.
—. ——.

Q. And the boat — here to Philadelphia in July?

A. Yes.

Q. Then they did have under that arrangement from this conversation in July time to straight- up?

A. I did not give any such permission.

Mr. Keating: May it be noted I have an objection to this?

The Court: I will allow him to testify just what he said to this man. The testimony is limited to that.

Q. Before the ship got here in July he had been requisitioned by the British Government?

A. I would have to consult my records to say that. My recollection is we were notified that a portion of her space would be taken for the British Government and she would be limited as to space.

Q. Well, that notification was sent to you before she got here in July?

A. It is an easy matter to get the facts by my consulting my records.

Q. Well, I wish you would do that before the trial is over? I would like to know the date when you got that and if you have a copy of the notice I would like to see that. That is all for the present.

Mr. Keating: Suppose you go and see if you can get the information.

56 M. M. RICHARDSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Richardson, during March, 1917, were you,—did you have any connection with the British Government?

A. Yes.

Q. Will you please tell the jury what that was?

A. I was British Vice-Consul and British Consulate General in New York.

Q. At New York?

A. Yes.

Q. Now, on March 11, 1917, what purported to be a contract for the sale of the Eskasoni was entered into between Gaston, Williams & Wigmore and George Moulton and Philip Templeman. Did that matter come to your attention officially?

A. Yes.

Q. The Eskasoni was a British ship?

A. Yes.

Q. And under your jurisdiction?

A. Yes.

Q. How did it come to your attention, Mr. Richardson, if you recall?

Mr. Nolan: Now, if your Honor please, I object to that as incompetent, irrelevant and immaterial.

The Court: I think that his testimony had better be limited to such negotiations as he had with Gaston, Williams & Wigmore.

Mr. Keating: What he did to the Eskasoni is the point.

57 The Court: I will allow him to say what he did with her so far as that is concerned.

Q. Do you recall how this matter came to your attention, Mr. Richardson?

A. Well, it is three years ago and I could not recall all the details but if my memory serves me right we were approached in the Consulate by Gaston, Williams & Wigmore, with a view to ascertaining whether the proposed sale of this vessel with some clients they had in view would be approved.

Q. That is Moulton and Templeman?

A. Yes.

Q. And what did you do with that request?

Mr. Nolan: Now, if your Honor please, I object to this line of testimony as not at all binding upon the plaintiff.

The Court: What he is trying to do is trying to show the good faith of Gaston, Williams & Wigmore in the transaction.

Mr. Keating: And I am going to establish that this thing is absolutely illegal and void.

The Court: I am going to rule against you on the question on whether the plaintiff was bound by any laws that may have been enforced in Great Britain.

Q. Under the Circuit Court of Appeals decision, your Honor, I think it allows me to prove it.

58 The Court: I say upon the question of law I am going to rule against you.

Mr. Nolan: Then may I take one general exception to this line of questioning?

The Court: Yes.

Mr. Keating: Exception.

Q. And what did you do with that request?

A. My recollection is it was intimated to Gaston, Williams & Wigmore that the sale would not be approved.

Q. Is an intimation by the British Consul a little stronger than the ordinary suggestion that——

Mr. Nolan: That is objected to.

The Court: Yes.

Q. What I really want——

A. They understood perfectly well what was intended. There is no doubt about that.

Q. You used diplomatic language but you made yourself clear?

Cross examination.

By Mr. Nolan:

Q. Was there any written communication sent to Gaston, Williams & Wigmore concerning this transaction?

A. I am sorry I cannot remember. There would be no objection to putting it in writing, so far as I am concerned.

Q. What I would like to know is whether you have any records in your office that you did indicate to Gaston, Williams & Wig-

more that they could not dispose of the Eskasoni to these
59 particular people or was it an intimation that the boat could not be disposed of by them until further instructions from England or just what was it?

A. Well, that was part of the Board of Trade regulations that a British ship could not be sold during the war unless the license was granted.

Q. Could not be sold to anybody without the license being granted?

A. No.

Q. Then when you gave them the intimation that the boat could not be sold at the time that was tantamount to denying the license, was it?

A. Yes.

Redirect examination.

By Mr. Keating:

Q. Mr. Richardson, was there any objection with respect to the parties to this transaction, by that I mean any personal objection to Moulton and Templeman on the part of the British Government?

Mr. Nolan: Same objection.

The Court: Yes.

A. Well, in an official capacity one is not obliged to state the grounds upon which an objection is raised, I mean a refusal is made.

Q. Is there a breach of any of your confidential opinions—if so, I will not ask you—but can you tell me without breach in faith at all whether there was any objection personally to Moulton and Templeman?

A. Well, I tell you we made it a rule at the Consulate and in all our advices to refrain as far as possible from the criticism of
60 any person here, whether he was American, British or Canadian, we have tried to avoid personalities.

Q. May I ask you this question and if you object to it I withdraw it? Were Messrs. Moulton and Templeman in 1917, March, permitted to sell the Eskasoni or not?

A. My previous reply rather covers it gratefully.

Q. Well, I will not press the matter.

Mr. Nolan: That is all.

EUSTACE CONWAY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Conway, are you a member of the British Bar?

A. Yes, sir.

Q. Are you a barrister or a solicitor?

A. Barrister.
Q. And when did you become a barrister?
A. 1880.
Q. And you have been a barrister ever since?
A. Yes, sir.
Q. Are you also a member of any American bar?
A. Yes, sir, New York.
Q. How long have you been a member of the New York Bar?
A. Since 1881, 1882.
Q. Have you kept at your British reading and so forth since you became a barrister?
A. Considerably, as far as my time would allow.
61 Q. Have you read the document which purported to be a contract between Gaston, Williams & Wigmore and Moulton and Templeman for the purchase of the Eskasoni?
A. Have you got it there so that I could recognize it?

Mr. Keating: May I show him Exhibit 2?
Mr. Nolan: Yes, that is all right, page 70.

Q. (Handing exhibit to witness).
A. Yes, I have seen this.
Q. Now, Mr. Conway, I tell you that the Eskasoni was a British ship. Will you tell the jury what rule, what laws there were in England in March, 1917, with respect to the sale and approval of British ships?

Mr. Nolan: Now, if your Honor please, I object. I cast no personal reflection upon Mr. Conway but I hardly think he has been qualified as an expert on British law. He has been practicing in the United States since 1882.
The Court: I will allow it.
Mr. Nolan: Exception.

Q. (Question repeated.)
A. There was the Defense of the Realm regulations which had the force of law and the Admiralty and Army Councils had authority to proclaim them and enforce them.
Q. Now, wasn't there any—what was the part of the Defense of the Realm Act which you have in mind; just read it aloud?
62 A. Section 39*cc*. A person shall not without permission in writing from the shipping controller directly or indirectly or whether on his own behalf or on behalf of or in conjunction with any other person purchase, enter into or offer to enter into any agreement or any negotiations with a view to agreement for the purchase of any ship or vessel. If any person acts in contravention of this regulation or if any permission of the shipping controller has been granted under this regulation subject to any conditions and the person to whom it was granted fails to comply with any condition, he shall be guilty of an offense against these regulations."
Q. Well, Mr. Conway, will you give it, will you tell us whether or not in your opinion, that contract on page 70 was a good contract under British law?

Mr. Nolan: Oh, I object to that.

The Court: Yes, I think so.

Mr. Keating: Your Honor, just let me state our position a little bit. We have a decision under the Circuit Court of Appeals decision in this case by which it came back for a new trial. The Court said that this 39 c. c. only imposed a penalty for this in other words, that it did not absolutely *forbade* the thing and make it illegal and void. Now we have a decision which says that this was not only imposed as a penalty but absolutely made any dealings illegal and void and of no effect. Now, this man has testified he is
63 suing for having procured that contract. Now, if what he has procured is something which is void and of no effect he cannot possibly recover. The agreement was to procure a purchaser. A man cannot be a purchaser unless there is something to buy or he is able to buy.

The Court: Isn't the contract to be construed by our law?

Mr. Keating: This contract?

The Court: Yes.

Mr. Keating: No. This was a sale of a British ship.

The Court: I think it depends upon the law of the United States. That is, my theory of the case is that when he produced these purchasers there they had the right, Gaston, Williams & Wigmore had the right to scrutinize them and did not have to accept them, if they believed that they might not be able to buy or could not by reason of the existence of some British law carry out some contract they entered into.

Mr. Keating: What happened here was that Mr. Warner brought these two gentlemen in perfect good faith both on Mr. Warner's part and on our part as we testified we entered into this contract, signed this contract. We went down to the British Consulate's office and found it could not be done, that the action was absolutely forbidden and it was after that that we withdrew from the thing. It
64 was not safe. We went blindly into the thing without knowing that it could not be done and agreed to do it and we were innocent. The same thing, suppose these men unknown to us had been Germans we would have approved them just the same if we had known it and even Mr. Warner has——

The Court: I am going to rule against you on the question of law when it comes down to that.

A. I had not quite finished. Section 48 also in addition, "Any person who attempts to permit or procure, aids or abets or does any act preparatory to the commission of any act prohibited by these regulations or harbors any person whom he knows or has reasonable grounds for supposing to have acted in contravention of these regulations shall be guilty of an offense against these regulations."

Q. Have you finished, Mr. Conway?

A. Yes.

Mr. Keating: Now I understand I am to be allowed to question the witness but your Honor will strike it out.

The Court: Yes.

Q. Mr. Conway, will you tell us what your opinion is as to the effect on the British law of that proposed, of that contract, Plaintiff's Exhibit 2?

Mr. Nolan: For the purpose of the record I will take an objection.

65 The Court: Yes.

Mr. Keating: Exception.

A. In my opinion it was absolutely illegal and against public policy.

Q. Against the public policy of England?

A. England.

Q. Could it have been enforced?

A. No.

Q. Would any right of action lie in the British courts for breach of a contract?

A. No.

Q. Have you any authority in your British books to back up your position?

A. Several authorities since 1916 and 1917.

Q. In other words, Mr. Conway, just let me ask you one more question. Does the Defense of the Realm Act merely impose in your opinion a penalty for doing these things, that is for negotiating a sale or entering into a negotiation or sale or does it absolutely make the thing void?

A. Not only is there a very strong penalty provided in the regulations but in addition to that it has been held as to a great many of these regulations no civil rights can spring from such a contract.

Q. In other words, under British law there was not a sale of the vessel?

A. There was not any contract.

Q. Now you say you have notes of a couple of authorities? Will you tell us what they are?

A. Anglo Russian Merchant Traders against Batt & Company, 2 Kings Bench, 679, Cases on Appeal. The contract was 1915 and this appeal was 1917. In that case the lower courts had held

66 in favor of the contract for delivery of certain merchandise the sale of which was prohibited by one of these sections.

Q. Without a license?

A. A sale without a license. Exactly similar to this present clause.

Q. Exactly similar to 39 c. c.

A. In shape and form to 39 c. c. and the Court of Appeals reversed saying that at the date of the contract there was a provision against the export of aluminum from this country except on license granted by the Government. In December, 1915, an order was made applying regulation 30*a* of the Defense of the Realm regulations to this merchandise and providing for the penalty on as against any persons buying, selling or dealing in or offering or inviting or entering into negotiations for the sale of such merchandise under the contract.

The lower court held that the sellers at that time could recover damages because they held that the sellers applied for license and the license was refused. Held upon the assumption that the shipment was limited to the United Kingdom and that the contract did not impose actually upon the sellers an absolute obligation to ship or pay damages in default of shipment. Held further that the shipment was not limited by the contract but a shipment from the United Kingdom under that regulation 30*a* of the Defense of the Realm regulations prohibited any dealings in the widest sense in that merchandise in countries amenable to the British law and therefore prohibited the shipment by the sellers of the merchandise on and after December, 1915, from any country and secondly there was no default on the part of the sellers. Therefore performance of
67 the contract became illegal and they were not liable for damages.

And in another case in the same volume, page 1, there was a question whether under the war powers the government seized a large plant for munitions, interfering with contracts for buildings and so forth that were going on and it was held that either party had any cause of action against the other, the government having overridden all private rights in taking the property and several other cases to that effect.

Q. Well now, Mr. Conway, do you know whether, could law other law, I ask you now in general—could any other law transfer this ship but the British law?

A. No.

Q. By agreement?

A. I should say not.

Q. Was there any way that you know that this contract, Plaintiff's Exhibit 2 could have been enforced any place in England?

A. Under English law?

Q. Yes.

A. No, not under English law.

Mr. Nolan: No questions.

68 JOHN B. AUSTIN, JR., recalled.

Cross-examination.

By Mr. Nolan (continued):

Q. Did you find any?

A. Some time in April.

Q. Some time in April?

A. Some time in April it was definitely decided.

Q. Decided what?

A. About the requisitioning.

Q. That the British Government had requisitioned it?

A. Yes.

Q. Then at the time it arrived it was under requisition by the

British Government and Gaston, Williams & Wigmore could not sell it, except subject to that requisition?

A. Yes.

Q. Then Templeman and Moulton had come to you after the ship had arrived here in the United States to carry out this contract and they were relieved from this mysterious intimation of the British Consul, you could not have sold the ship to them anyhow?

A. I could have sold it to them subject to the requisition.

Q. And that requisition, was a certain space in the ship requisitioned by the British Government?

A. 50 per cent for the British Government.

Q. Then all they could use on the ship would be 50 per cent after you sold it to them?

A. No, that is not exactly right. They operated their vessel. 50 per cent of the cargo they can procure themselves at their own rates; 50 per cent they have to load with cargo given by the Government at specified Government rates.

69 Q. They could only use 50 per cent of the cargo space for general cargo?

A. That is all.

Redirect examination.

By Mr. Keating:

Q. Now, Mr. Austin, in calling off this contract with Moulton and Templeman that, as I understood your testimony, whatever effect it may be on the plaintiff, the contract between you and Moulton the alleged contract between you and Moulton and Templeman was called off because the permission of the British shipping comptroller could not be obtained?

A. Absolutely, that is all.

Mr. Keating: Now, if your Honor please, there is one witness we want that Mr. Austin would like to go out and telephone about.

The Court: As they have to send for the next witness the jury is excused until two o'clock.

Recess.

70 Afternoon Session.

PHILIP A. WARNER, recalled on behalf of the plaintiff, in rebuttal.

Direct examination.

By Mr. Nolan:

Q. Mr. Warner, did you hear Mr. Austin testify about the supposed custom here in New York this morning?

A. Yes.

Q. Did you know that there was any such custom prevailing in New York that the broker should have his money only as and when the seller was paid for the article?

A. No, sir.
Q. When did you expect you were to get your commission?

Mr. Keating: I object to that.
The Court: He got part of it at one time.

Q. Did you make any demand for the full commission at the time you got a portion of the commission?
A. Yes, sir.
Q. Who did you make that demand on?
A. On Mr. Austin.

The Court: What was said when you made the demand?

Q. What was said?
A. He said that they would be glad to pay me the money
71 a little later, but at the present they were waiting for some further information regarding whether the contract was going to remain in force, or something of that kind, if I remember rightly.
Q. What did you say to it?
A. I told him I would be glad to get the money, and he simply put me off, that was all.
Q. Did you hear Mr. Austin testify this morning that he had made a joking demand on you for the sum of $125?
A. Yes.
Q. Do you recollect any such interview with him?
A. No, sir, he never said anything of the kind.
Q. Did you ever make any remark to him that you were going to give it back?
A. No, sir, the subject never came up.
Q. Did you go to Mr. Austin's office after the date when this $5,000 was returned?
A. Yes, sir.
Q. Were you present at any interview between Mr. Austin and Mr. Templeman and Mr. Moulton after the incident when they returned the check?
A. Yes, sir, I went there on two occasions I think.
Q. Was there any conversation had between those three gentlemen at the interview at which you were present concerning the putting into effect of the contract for the sale of the Eskasoni if Mr. Moulton stepped out or if Mr. Moulton was straightened out with the British Government?
A. Yes, he told Mr. Templeman that he was all right with the British Consul.
Q. Who?
A. Mr. Austin said that.
Q. What else was said?
A. I don't know if there was anything more said except
72 some conversation on the same line, at that particular time.
Q. Was that the day that Mr. Moulton handed in his assignment of his interest in the contract?
A. Mr. Moulton had handed his assignment in to Mr. Templeman before that.

Q. Before that interview?
A. Yes, sir.
Q. And when you and Mr. Templeman and Mr. Moulton went down to see Mr. Austin, was that in regard to carrying out the contract?
A. Yes, sir.

Cross-examination.

By Mr. Keating:

Q. Mr. Warner, are you familiar with all the general customs that exist in the brokerage business in New York?
A. I don't claim to be, no, sir.
Q. As a matter of fact your regular business is that of a civil engineer, is it not?
A. Yes, sir.
Q. Do you swear positively that there is no such general custom in the trade that a broker shall not receive his commission unless the money is actually paid and the sale goes through?
A. Put that question to me again, please.
Q. (Question repeated.)
A. I never heard of the custom,—I want to answer that question further, if I may.
Q. Your first statement is you never heard of it?
A. No, I didn't say—I always understood that a man gets his commission in full when the contract was signed, and that is what I was trying to do in this case.
73 Q. You never heard of this other custom of which I spoke?
A. No, sir.
Q. When did you first go into the ship brokerage business?
A. In the spring of 1916.
Q. How many boats did you sell as broker?
A. I had a hand in the chartering of a number of ships. This was the only ship that I sold, the ship Eskasoni.
Q. Did you ever do any business with any other concern in your capacity as a ship broker than for Gaston, Williams & Wigmore?
A. Yes, sir.
Q. What were the other concerns?
A. Lee, Higginson & Company, of Boston.
Q. Any one else?
A. And several brokers here in New York, ship brokers that I had dealings with, and there were some ship brokerage concerns, one at 17 Battery Place.
Q. What steps did you take to ascertain what the general customs in the trade were?
A. I didn't find that necessary. I had an agreement with every one of these gentlemen with whom I had any dealings.
Q. You just went around and tried to make a separate agreement to cover everything, is that right?

A. I got a written letter from them, stating what commission they would pay me.

(Witness excused.)

74 GEORGE ALBERT MOULTON, called as a witness in behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. Where do you reside, Mr. Moulton?
A. New Rochelle.
Q. What is your business?
A. Shipping.
Q. What was it in 1916 and 1917?
A. Shipping.
Q. How many years have you been interested in the shipping business?
A. All my life but four.
Q. When did you first come to New York?
A. I came in January, 1915.
Q. Were you associated in 1916 with Mr. Philip Templeman?
A. I was.
Q. Are you the Mr. Moulton that we have been discussing for the last day here?
A. I am.
Q. You entered into a contract with Gaston, Williams & Wigmore for the purchase of the Eskasoni?
A. I did.
Q. Were you ready and willing to carry out that contract?
A. I was jointly with Mr. Templeman ready and willing.
Q. Did you ever, Mr. Moulton, receive in connection with the Eskasoni any intimation or suggestion from the British Consul or any other British authority that you were objectionable and that you could not purchase or own British ships?
A. Never.

75 Q. The British Counsel testified this morning while you were here,—did you hear him say that he gave an intimation that the Eskasoni could not be sold?

A. I did.
Q. Had you any difficulty with him?
A. No. I had a conversation with him, I think it was after the signing of the contract for the Eskasoni, where he seemed peeved because we,—I mean the Templeman Steamship Company, in which Mr. Templeman and I were stockholders,—we had a boat called the Shigizan Maru, a Japanese boat, under charter, and we re-sold the charter to an American concern named Interchange, Limited. Sometime after we effected that sale the British Consul sent for us and told us that he didn't favor that sub-charter and we would have

to break it, and we wanted to know why and know what was wrong with the Interchange, Limited, and he said, "Oh, nothing, except we don't look upon them with favor." I said, "Well, are they blacklisted?" He said, "No." I said, "How could I know that you do not look upon them with favor?" He said, "Don't you move around and see what is going on?" I said, "Yes, but I spend most of my time in my office, and I never heard anything about them, and if they were not on the blacklist, how could I hear? I could not listen to any hearsay." He said, "We don't look upon them with favor, and you are a British subject, and you will have to break the charter." I said, "We cannot. We haven't got the money to pay them back, and we don't see why we should break it, because it was made in good faith on both sides." He didn't say anything definite
76 about us, but he intimated that he looked upon our actions with considerable disfavor, and that was the end, as far as we were concerned, until the case was tried in Baltimore, before Judge Rose, and Judge Rose decided against the breaking of the charter.

Q. Judge Rose decided in favor of the Interchange, Limited?

A. Yes.

Q. And that was an Am-rican concern you say?

A. Yes, an American concern and a Japanese boat.

Q. Is that the only matter you knew there was any difficulty about,—that you had any difficulty whatever with the British authorities?

A. That is the only difficulty I ever had.

Q. You were a British subject at the time?

A. At that time, yes.

Q. A loyal British subject?

A. I was.

Q. Newfoundland is a separate country?

A. Yes, with self-government the same as Canada.

Q. It has its own laws?

A. Yes.

Q. Governing the registry of ships?

A. Yes. They use the British shipping list.

Q. And the Eskasoni was a Newfoundland registered vessel?

A. Yes, Canadian owned.

Q. Did you ever go to Mr. Austin after the return of the check for $5,000?

A. Several times.

Q. Did you go with Mr. Templeman at any time?

A. Yes.

Q. And was Mr. Warner present at some of those interviews?

A. Twice.

Q. What was the first time after the return of the $5,000.
77 check that you went to Mr. Austin's office, I mean about how many days after?

A. I think it was the very next day.

Q. Tell us what happened at that interview?

A. We told them we could not comply with the request in his letter to take the check, and we could not destroy the signature on

the contract, neither could we hand him back the contract, and we demanded that he carry out the contract; that there was no reason that he should not. We had complied with the provisions of the contract up to date, and he said, "Well, the British Consul has told us that they didn't want us to do business with you or sell you the ship, and you are not in favor with them, and we do a lot of business with the Canadian authorities, and we cannot afford to get into any wrong with them, and it puts us in a very embarrassing position." And finally I said, "Well, what we will do is to suspend the contract for the time being. Keep the contract but suspend it so that you can say to the British Consul that it is called off, but on the sole condition that you agree that the minute this thing you speak of with the British Consul is removed, then we will go on with the contract the same as before, and rather than have you in an embarrassing position. We argued about that, and he would not agree to it then, for about half an hour, and we refused to break it, and finally he and Mr. Martin, the secretary of the company, absolutely agreed that they would put the contract in force as soon as that supposed disability was removed.

Q. Did you just before going there execute an assignment
78 of your interest in the vessels to Mr. Templeman?

A. Yes, I did. That is it (handing paper to counsel).

Q. That is the assignment?

A. Yes.

Mr. Nolan: I offer that in evidence.

Mr. Keating: I object to it. This original deal, as I understand it was made with Mr. Martin and Mr. Templeman.

The Court: I will receive it.

Objection overruled.

Mr. Keating: I take an exception.

Paper received in evidence and marked Plaintiff's Exhibit 3.

Q. Did you and Mr. Templeman at any time after the receipt of the letter dated April 12 returning the $5,000 check receive a notification from Gaston, Williams & Wigmore that the Eskasoni was here and the time for you to make your next payment had expired?

A. No.

Q. They never delivered the vessel to you?

A. No.

Q. You were always ready to pay for it if they did?

A. We were.

Q. You say, Mr. Moulton, you have been in the steamship or shipping business all your life?

A. Yes.

Q. In New York?

A. Yes.

Q. Are you familiar with the custom which obtained as to the payment of brokers commissions in New York?

A. I am.

Q. How many charters have you chartered and purchased
79 of vessels where you had something to do with them on one side or the other during the five years you have been in New York?

A. At least fifty, probably more.

Q. Some you executed quite recently?

A. Yes.

Q. Did you hear Mr. Austin testify this morning that there was a custom that the broker should be paid only as and when the seller received the money?

A. I did.

Q. Was there at the time the contract was made or is there now any such custom in New York?

A. It is a custom on the part of the owner to write such words in the contract usually.

Q. It is a well known custom generally known that the broker shall only have it as and when it is received by the seller?

A. Just the reverse.

Q. What is the custom?

A. When the contract was signed the commission is earned.

Q. And the exceptions to that are when the words are written into the contract, that they shall be payable only when the seller receives his money?

A. Yes, as and when.

Cross-examination.

By Mr. Keating:

Q. Mr. Moulton, did you ever get yourself straightened out with the British Counsel?

A. I had nothing to straighten out, sir.

Q. What was the occasion of your executing this release of your rights in the contract to Mr. Templeman?

A. Because Mr. Austin said there was something to straighten out.

Q. What?

80 A. Because Mr. Austin refused to accept it and said there was something to straighten out.

Q. Did you ever go to the British Consul to see if you could not remedy this supposed defect?

A. I would not do it.

Q. You didn't give a darn whether you were accepted by the British Consul or not, did you?

A. I did not.

Q. You were determined to attend to your affairs without having the British Consul interfere at all, is that right?

A. No, I won't say that.

Q. You didn't intend to allow the British Consul to tell you how you should run your affairs, is that right?

A. Not unless he had a right to.

Q. You questioned his authority?
A. I did not.
Q. It is quite apparent that he had some objection to you, he said so himself?
A. He didn't tell it to me.
Q. You told me—you said a little while ago as I understood you that the British Consul said that he looked on certain things that you had done with disfavor?

Mr. Nolan: Not certain things,—a certain thing.

A. But he didn't tell me so.
Q. I thought you told the jury a few minutes ago it was in connection with the Shigazan Maru?
A. Yes, but he didn't tell me why I was in disfavor; I tried to find out and didn't, and never have found out.
Q. You were interested in getting whatever cloud there
81 was, whether *or* justified or not, removed by the British Consul?
A. There was not any cloud, my dear sir.
Q. You were then in favor with the British Consul?
A. I don't know whether I was or was not. He said I was not.
Q. I beg pardon?
A. He said I was not.
Q. Was not in disfavor?
A. No, he said I was in disfavor. He didn't say that exactly. He said that they didn't look with favor upon our transaction of selling that charter party to the Interchange, Limited, but he told me nothing definite about myself.
Q. You were not interested as a British subject during the war time, when your country was at war, in getting one of the authorities of the British Government to withdraw his statement that he did not look with favor on certain matters you had done?

Mr. Nolan: That is argumentative.
The Court: Objection sustained.
Mr. Keating: I take an exception.

Q. Mr. Moulton, will you tell me how many cases to your knowledge you have been a party to where the brokerage, where the deal fell through, where commissions were paid? I would like to know the names and the approximate dates?
A. I only know of one case where that happened, where I was interested, because every case where I was interested in I was always very careful to state specifically that the money would be paid to us
as and when received. One case I neglected to do that and I
82 had to pay it.
Q. What was the name of the steamer?
A. The Ojaka.
Q. Who was the broker?
A. A man named Gomez.
Q. Was there a charter party signed?
A. Yes, with Marcelino Garcia.

Q. Was it the usual covenant form of charter?
A. No.
Q. Gross form?
A. Yes.
Q. And ordinary gross form of charter?
A. Not the ordinary. There was something against the charter parties. This was Marcelino Garcia's form of charter party.
Q. Mr. Garcia is in what business?
A. Sugar.
Q. Didn't that charter party contain in the last two sentences or thereabouts the statement that a commission of so and so was due on signing?
A. I did.
Q. That is exactly as I thought. In other words there was an express provision in that contract that you are now speaking about that the brokerage was payable on the signing?
A. It was.
Q. So that has not anything to do with the general custom?
A. No, the exception is, as I say, that is the only case I know because the others I had put the express condition in that the money was to be paid as and when received. The reason it was not in this one, I was sick at the time and another officer of our company signed it and it was not stricken out.

Q. What I am getting at is, that this case is not in point
83 because there was an express provision, is that so?

A. Yes, correct.

Q. Do you know of any case that has come to your knowledge or of which you have heard where there was nothing said either way, namely, that the brokerage was due on signing or that it was not due until the money was paid? Do you know of any case in your experience when nothing was said in the contract about it?
A. I cannot recall at the minute any such case.
Q. As a matter of fact, to be perfectly frank, Mr. Moulton, do you know whether there is any general custom on that subject or not.
A. Only my own opinion, and my knowledge of the ship brokerage business. I would say it would be the custom to pay it, otherwise if that were not so why would we be so careful to put in that the money was not payable until as and when received?
Q. The usual thing is to make a statement either way is it not? Either that it is paid on signing or not until earned?
A. I have only known a case. It is always stated the one way, "as and when received". I have never known a case where it is stated the other way.
Q. Except the one you have just mentioned?
A. Yes.
Q. Have you ever chartered or acted as a broker in the charter of a steamer?
A. I don't recall it.
Q. Don't you know, Mr. Moulton, that in the ordinary practice among steamship owners, that a broker expects his commission as the charter hire was paid?

A. They usually do, yes.

84 Q. That is the fact, isn't it?

A. Yes, that is the fact.

Q. In other words, the money is not all paid at the outset, isn't that the fact?

A. As a matter of accuracy that is so.

Q. I didn't ask you that. Isn't it true that as the charter hire is earned and paid in the ordinary form of time charter, the owner then pays the broker's commission on each installment of hire?

A. That is correct.

Q. You actually received back this $5,000, did you not?

A. Mr. Templeman did, I did not.

Q. He put the money in his pocket at any rate?

A. I assume so.

Q. Is it not the fact that it was concluded not to go ahead with this because the permission of the British Government and the shipping comptroller could not be obtained to you and Templeman becoming purchasers, whatever the reason may have been?

A. That is not the fact.

Q. What is the fact?

A. The fact is that Mr. Austin made that statement.

Q. And after he made that statement did you go down and verify it?

A. I did not.

Q. Do you know whether Mr. Templeman did?

A. Yes, he told me he did.

Q. And did he tell you that the permission could not be obtained?

A. He didn't use exactly those words.

Q. Didn't they use the word "intimate", that has been used here so much today? Did he intimate to you?

A. I guess that is about right.

85 Q. There was not any doubt, you got it clearly in your mind, however, that you and Templeman, for some reason or other were not able to get the permission, is that the fact?

A. I did have that in my mind from what he said.

Q. And that was the reason you agreed to receive back this money?

A. Oh, no. We agreed to take it back expressly on the condition that the matter was straightened out, whatever there was to straighten out,—at that time we had no definite knowledge from the British Consul, neither one of us had, but if that were the case, we agreed when it was straightened out, to continue on the Gaston, Williams & Wigmore contract again, and that is the reason we accepted money back.

Q. In other words your agreement was that when you and Mr. Templeman got your selves in favor again——

A. (Interrupting.) No, that was not the agreement. The agreement was if we arranged matters satisfactorily. As a matter of fact we arranged them satisfactorily by my stepping out and assigning to Mr. Templeman, and Mr. Templeman making good with the British Consul. That was satisfactory to the British Consul.

Mr. Keating: I move to strike that out as a conclusion of the witness.

The Court: Yes, unless the consul told him so.
The Witness: The consul didn't tell me so.
The Court: Then strike it out.
86 The Witness: I am only repeating to you what I heard Mr. Templeman say and what Mr. Austin said the British Consul told him.
The Court: I will allow what Mr. Austin told him.

Q. We want to hear what Mr. Austin told you.
A. Mr. Austin told us when we went back,—when we went back to see Mr. Austin after Mr. Templeman had straightened out with the consul——
Q. Wait a moment.

Mr. Nolan: Let the witness finish his answer.
The Court: State what Mr. Austin told you and Mr. Templeman.
Mr. Keating: The question that I am asking the witness is this:

Q. You have no personal knowledge of your own knowledge as to what Mr. Templeman did? You didn't go with him to the British Consul, did you?
A. I did not.

Mr. Keating: I ask therefore that any testimony regarding what Mr. Templeman did to get himself straightened out be stricken from the record.
The Court: Very well.
The Witness: I do know——
Mr. Keating (interrupting:) Wait a minute.

87 Q. The date of this assignment was the 13th day of April, 1917?
A. Yes.
Q. Did you ever secure authority from Gaston, Williams & Wigmore to make that assignment?
A. No.

(Witness excused.)

WILLIAM H. ELLIS, called as a witness on behalf of the defendant, in rebuttal, being duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Ellis, what is your business?
A. Steamship manager and broker.
Q. What company are you with?
A. Now with the J. G. White Engineering people.
Q. How long have you been in the steamship business as broker?
A. All my life; a short time as broker but in the sale of ships as general manager of a steamship line all my life.
Q. What company were you with before you were with the J. G. White Company?

A. The Ward Line.
Q. How many years were you with them?
A. Four years.
Q. Who were you with previous to that?
A. With a fleet of steamers on the west coast of Central America.
Q. You were with the Ward Line here in New York?
A. Yes, sir.
88 Q. During the war?
A. Yes, sir.
Q. Are you familiar with the general customs of the steamship business with respect to brokers?
A. Yes, sir.
Q. In the absence of any provision in the contract as to when the brokerage shall be earned, will you please tell us whether there is any general custom as to when it shall be paid?
A. As to when it shall be paid?
Q. Yes.
A. It shall be paid immediately the deal is consummated.
Q. Suppose the deal is supposed to be consummated and the parties brought together, but the steamer is not actually sold, is it or not the custom of the trade that the brokerage is paid?

Mr. Nolan: I object to that as indefinite.
The Court: Yes, objection sustained.

Q. Assuming, Mr. Ellis, that a contract is signed which cannot be enforced for some reason?
A. Yes.
Q. And the ship is never sold?

The Court: And never delivered.

Q. And never delivered, is there any custom as to whether any brokerage is payable under those circumstances in New York?

Mr. Nolan: My testimony as to that was in rebuttal, so I
89 would like to preserve the same objection. I take objection and exception.
The Court: Yes.

A. I would answer that like this. In the ship brokerage business that I have been accustomed to deal with, if any deal was consummated and there was no written provision in the contract for bringing two people together and nothing was done, we would claim nothing.

The Court: Suppose the contract is actually signed between the two parties, what is the custom then?
The Witness: The deal,—the custom is the deal must be consummated unless there is a stipulation yes or no, the deal consummated or not, I will pay you so much.
The Court: You mean by consummation the delivery of the vessel pursuant to the terms of the contract?
The Witness: Yes, sir, consummation of a sale. The sale has to take place.

Q. In other words if the sale does not go through no brokerage is payable?

A. Not in my world, no. We don't pay any brokerage.

The Court: Is that by special agreement between you and the broker?

The Witness: That would be by special agreement. Let me put it this way: I have in my life brought two people together
90 and the ship not being sold, or the barge not being sold, they met and said according to the arrangement I would get my brokerage anyhow, and the brokerage was paid. But if I had not made that special agreement, I would not have insisted on my getting the brokerage.

The Court: Is that what you did in a specific instance?

The Witness: Yes.

The Court: Do you know whether there is a general custom among shipping men as to the matter you have just testified to?

The Witness: Yes, there is a general custom. If in the sale of a steamer or a vessel an obstacle arises which is a proper obstacle which prevents the consummation of the selling and delivery of a steamer, brokerage will not be paid in New York to the best of my knowledge and belief.

Cross-examination.

By Mr. Nolan:

Q. How many cases have you acted in as a broker, Mr. Ellis, in New York?

A. In New York I have acted as broker for years.

Q. What concerns were you connected with in New York during your work here?

A. With the Ward Line.

Q. And you had the overseeing of all contracts for the purchase of vessels by them?

A. I would say yes.

91 Q. And they did buy a number of vessels during the war?

A. Not a number.

Q. Did they buy any?

A. Yes, sir.

Q. What ones?

A. I am giving away their secrets and I would rather not answer that question.

Q. Well, I hate to press it, but your testimony as to a custom, and you really not being an engineer but coming from somewhere else, and telling about a custom, is surprising to me. I have been in the shipping business for fifteen years, and I would like to have the names of the ships so that we can find out what ships they were?

A. I would like to have a little time to produce it, to ask my people if I am at liberty to do so. I am willing to tell you all I know because I am only here on the spur of the moment.

Q. How many were there, without giving us the names?

A. I would say one.

Q. And did you participate in the buying or selling of any other ships than that one in the four years you were with the Ward Line?
A. Not with the Ward Line, no.

(Witness excused.)

92 JOHN B. AUSTIN, recalled on behalf of the defendant, in rebuttal.

Direct examination.

By Mr. Keating:

Q. Mr. Austin, you heard Mr. Moulton's testimony regarding the transaction in calling off this deal. Will you tell use whether his interpretation of what happened is the truth or not?

A. It is very hard to recollect the exact words that passed at the time. We had worked for three or four months in negotiating with these people to sell the boat. We were anxious to sell them the boat or we would not have worked on it all that time. When the time came to make the first move we were confronted by an obstacle which we could not get over, namely, the lack of the approval on the part of the British authorities, our company being a subscriber among others to the British bunker agreement. When we found that we could not get over that we told them what the circumstances were, and having other things to do I dropped the case and worked with other business. We would have been glad for some one to consummate the deal and go through with it. The ship was still in the yard being repaired.

Q. In Liverpool?
A. Yes, in Liverpool.
Q. Did you ever tell them that they had an indefinite period in which to get straightened out?
A. I don't recall making any such statement.

93 Q. Did you tell them that if they did get themselves straightened out you would take it up with them?

A. I probably did.
Q. Did you at any time tell Mr. Moulton or Mr. Templeman if they got themselves straightened out at any time you would then sell them the boat?
A. No, I would not give them an indefinite period.
Q. Did Mr. Moulton ever get himself straightened out?
A. I do not know. I cannot answer that question.
Q. Did he ever come to you and tell you that he got himself straightened out?
A. No. At our last conversation with him, he was still not straightened out. Mr. Templeman was.
Q. When?

Mr. Nolan: I object to that. He was still not straightened out.
The Court: Let him tell what he told Moulton.

Q. Do you recall when it was that Mr. Templeman came to you and told you that he was in the good graces of the British Government again?

A. No, I cannot fix that date.

Q. Was it a short time or a long time?

A. Really I cannot tell. My impression is that it was—let me see, I should say inside of two months. I think he was straightened out in a comparatively short time.

Q. So far as you know Moulton never was?

A. As far as I know Moulton never was.

Q. The price of ships had been going up steadily from March until the time the Eskasoni got here in July, had they not?

A. Yes, the price of vessels was rising.

Q. It was a pretty lively market at that time and people were paying almost any price for vessels?

A. Not for vessels under requisition.

Q. For vessels free of requisition, the price was a negligible quantity to the average buyer, wasn't it?

A. That is a pretty strong statement, but to a certain extent you are right.

Q. They ran up pretty close to $280 or $300 per ton?

A. Not old vessels, new vessels did, yes.

Q. And the older vessels ran up also?

A. Yes, sir.

Q. You had a number of offers for the Eskasoni after she arrived in Philadelphia?

A. Practically none that could be met because we didn't sell the vessel. I sold the vessel finally a year and a half later for $20,000 more than this particular price.

Q. To the Newfoundland Government?

A. No, to citizens of Newfoundland.

Q. The reason you could not get a better price was on account of the requisition arrangement requiring 50 per cent of the cargo to be carried for the British Government?

A. Probably so.

The Court: Do you recall whether it was before or after you had that the British requisitioned your vessel?

The Witness: It was about the same time, somewhere about the same time, your Honor. We never got another trip out of it. The vessel had been in Liverpool, had put into Liverpool in distress back in the winter, I think it was, of 1916. The shipyards were in such bad shape there that it took a tremendous time to get the vessel repaired, and while it was being repaired they commenced to talk about requisitions, and we asked that the British authorities give us the space, to give us more space and more space than they wanted to give us, and it took some time to straighten it out.

The Court: How long after this contract was entered into was it any talk with the British Vice Consul as to the carrying out of the contract of sale?

The Witness: I am afraid I cannot answer that question.
The Court: Very well.

By Mr. Nolan:

Q. Did you get any larger offers than this $475,000 between the time that you returned the $5,000 and the time the ship arrived here or the time the British Government applied the requisition?
A. I think we were getting offers, if you can consider them such, right along. Mr. Warner himself brought in one offer which could not be carried out.

96 Q. Was it as high as $575,000?
A. I can tell from my papers; somewhere around that.
Q. Mr. Gaston was in England at the time, was he not?
A. That is a pretty hard question for me to answer.
Q. I was wondering if you recollect a cable that he sent concerning the proposed sale of the ship?
A. I think Mr. Gaston was in England in the spring of 1917. There is no doubt about that, because I remember he was working on the Eskasoni requisition over there himself, but just when he returned I don't remember.
Q. Do you remember getting a cable from him not to sell the Eskasoni for $475,000 that you could get a higher price in New York for it?
A. No, but if you have a copy of the cable I would be very glad to tell you if I remember it, and if not I will look through our files.

Mr. Keating: That is our case.

Adjourned to Wednesday, February 11, 1920, at 10:30 o'clock A. M.

97 New York, February 11, 1920.

Mr. Nolan: If your Honor please, I move to open the plaintiff's case and I want to offer Chapter 12 of the Laws of 1915, of the British Laws—I won't bother reading it.

Marked Plaintiff's Exhibit 4.

Mr. Nolan: Also, if your Honor please, I move to strike out the testimony of the witness Austin as to anything told to him by the British Consul and also on the ground that he has not been qualified to testify as an expert.
The Court: I will leave that question for the jury.
Mr. Nolan: Exception. I also move to strike out the testimony of the witness Ellis on the ground he has not qualified, and an exception.
Mr. Keating: I renew my motion made at the end of the plaintiff's case.
The Court: Motion denied.
Mr. Keating: Exception.

Mr. Keating summed up to the jury on behalf of the defendant.
Mr. Nolan summed up to the jury on behalf of the plaintiff.

98 *Charge.*

The COURT (KNOX, *J.*):

Gentlemen of the jury, in this case I am going to ask you, before submitting the whole case to you, to return a special finding upon some of the testimony that is now in the case before you, relating to the existence of a certain custom or usage at the Port of New York, and in your deliberations upon the question, you will consider only as to whether or not this custom or usage, as pleaded by the defendant in its answer, does as a matter of fact exist.

The defendant has pleaded as follows: "That at all times mentioned in the complaint there was and there now is a well known usage and custom existing in the shipping business in the Port of New York, that commissions under an agreement made between a ship broker and a ship owner to pay to the broker securing a charter commissions on the gross amount of the charter do not become due and payable except as when hire is paid by the charterer to the owner, and if during the charter period, the charter comes to an end in pursuance of its terms without fault on the part of the ship owner, or if the ship owner rightfully cancels and terminates the charter party the commission due from hire which the broker would have received if it had been earned, ceases as the date of such cancellation. The usage and custom at the Port of New York as above set forth was incorporated in the agreement for commissions herein."

Now that is the sole proposition that you will have to consider; you are not at this time to go into the mattter as to why the
99 contract in this case did not ultimately go through, simply as to whether or not this custom as pleaded existed at this port.

Q. Did they actually pay the balance of the $475,000?

Now there has been testimony offered to you upon this branch of the case on the part of Mr. Austin, who is the vice president of the corporation of Gaston, Williams & Wigmore, Limited, and he has testified before you that he has participated, I think, in some ten transactions which involved the sale of steamships at this port. He has testified that such a custom exists, but he has testified further that while he knew it, he didn't know whether such custom was generally known throughout the shipping business here in New York.

On the part of the defendant, you also have the testimony of another gentleman from the Ward Line, who testified that such a custom did exist, and he testified, as I recall, that frequently there is an agreement as to when commissions shall be paid; and he knows of one instance where the custom to which he refers was observed.

On the other hand you have the testimony of Mr. Moulton, who says that he has participated in some fifty transfers of ships and that the custom is not as has been stated by the defendant in this

action; that as a matter of fact the broker is ordinarily paid upon the signing of the contract for the sale of a ship, unless there is a special agreement to the contrary.

Now these are conflicting views of the witnesses upon
100 this branch of the case. What the actual facts are is for your determination, and I can only call your attention to what is necessary in the way of proof in order to establish the existence of a custom or usage.

I may say at this time that the weight and credibility of the evidence in this particular is for your determination also; you may pass upon it and give such credence to it as you feel, under all the circumstances, it is fairly entitled to receive.

Now under the law, particular customs and usages such as here claimed to exist in the business of selling ships, in order to be binding must be shown to be known to the person who is to be affected by the custom or usage.

There is no evidence, as I recall, in the case—in fact the plaintiff in the case, Warner, testified that he did not know of the existence of such a custom.

But the law goes further; it says that if a person who does not actually know of the existence of the custom is to be bound by the custom, then the usage or the custom must be so notorious, so universal in its application in the particular trade and business in which it is sought to be applied, and so well established in its practice, that the knowledge thereof must be presumed to be known to the person to be affected by the particular trade or custom in controversy.

Therefore, if you should find that the plaintiff in this action did not as a matter of fact know, that is, have actual knowledge of
101 the existence of any such custom or usage as is said to exist by the defendant, then you will inquire as to whether, upon the evidence before you, the existence of the custom, if you find it to exist, was so notorious, so well established and so universal in its application, that any one dealing in shipping and carrying on the sales of ships, must be presumed to have known it by reason of his association with that line of business, and your verdict on that branch of the case will be either for the plaintiff, if you find that the custom does not exist; or was not so universal, well known and notorious; or it will be for the defendant if you find the custom did exist and to have been so notorious well established and universal.

Mr. Nolan: May I call your Honor's attention to the stenographer's minutes in regard to Mr. Austin's testimony. Your honor stated that he said that he did not know if it was known generally. The testimony reads as follows:

"Q. Would you say that that custom is generally known to shipping brokers?

A. No.

"Q. And it is known to you at any rate?

A. Yes."

I ask your Honor to charge the jury that the witness Ellis testified that he only knew of one transaction, and that in that transaction, although it had fallen through, he personally had received his commission.

102 The Court: That is a question for the jury, they will remember the evidence as to what the actual facts were.

Juror No. 7: The witness Ellis, is that the gentleman connected with the Ward Line?

The Court: Yes.

Mr. Keating: If your Honor please, I ask you to instruct the jury that it was Mr. Warner's duty, in going into the business of ship brokerage, to familiarize himself with the customs of that trade.

The Court: Denied.

Mr. Keating: Exception. I ask your Honor to instruct the jury that they are entitled to take into consideration the fact that Mr. Warner did go into the ship brokerage business in considering whether he had knowledge and probably familiarized himself with the trade before he entered it.

The Court: There is no evidence that he did, as I recall.

Mr. Keating: But the presumption——

The Court: I will charge that, but with an amendment that even though that presumption does exist, if you fail to find that he had actual notice of the existence of this custom or usage, or the custom and usage was so universal and general in its application and notorious, that he would have knowledge of it.

Mr. Keating: I ask your Honor to charge the jury that they are entitled to consider the fact that Mr. Warner accepted $125 on the $5,000 actually paid in considering whether the general custom exists in accepting a commission on the amounts as actually paid.

103 The Court: They may take that into consideration, also the additional evidence, on the part of the plaintiff, that he made a demand for his commission at that time.

All the circumstances that bear on that branch of the case are germane to this question and may be considered by you.

Mr. Keating: I except to that part of your Honor's charge in which you stated that Mr. Moulton said he had indulged in fifty transactions.

The Court: If I made a mistake in that, gentlemen of the jury, that is for you. I simply gave you my recollection, but if my recollection differs from yours, your recollection is to govern; I did not mean to misstate the evidence.

Mr. Nolan: I think, your Honor, he stated that, and that he had handled six charters within the last ten days.

The Court: The jury will have to recall what the testimony was.

Mr. Keating: I ask your Honor to charge the jury that Mr. Moulton testified that his experience was that the matter covered by the question of his custom was always covered one way or the other in the contracts with which he dealt, and that in the very last one which he cited as an incident of brokerage being payable not earned, so to speak, there was an express provision in the charter party that the broker should be paid on the signing thereof.

The Court: You may consider that together with all the other questions that may come up.

Mr. Nolan: I ask your Honor to charge that Mr. Moulton,
104 as an experienced broker, stated that where it was not expressly placed in the contract of charter or sale, that the custom was, in his opinion, as a broker, that the fees were payable at the time of the signing of the contract.

The Court: That is part of the evidence and the evidence is for you gentlemen.

You may retire, gentlemen with the instructions I have given you and base your verdict on the law as I have laid it down to you.

The jury retired at 11:20 A. M.

At 12:30 p. m. the jury returned for further instructions.

The Court: The whole case has not been submitted to you; simply as to whether or not the custom and usage that the defendant claims to exist does as a matter of fact exist. You are not to go into the other matters of the case as to the merits or demerits of what actually happened to this particular contract, but what is the custom if there is a custom? Is there a custom where there is no mention made in the contract as to when brokerage will be paid; that is, that this contract as I recall it has no provision as to when brokerage is to be paid. Is there a usage or custom in the shipping business here in New York, the purport of which is that when there is no provision in this respect in the contract, that brokerage shall not be paid only as and when payment was made on account of the contract in question? That is a very simple issue and is to be decided de hors
105 the rest of the record.

Mr. Nolan: May I ask your Honor again to instruct the jury on the question of the prepoderance of evidence?

The Court: Yes. The burden of establishing the proof of the existence of this usage or custom is upon the defendant, and it must establish that by a fair preponderance of evidence.

The merits of this case have nothing to do with it at all. It is simply where there is a custom in the trade, as I charged you this morning, when the buyer falls down through the action of the person who is selling the ship or through his cancellation of the contract.

Mr. Keating: I take an exception to that part of your Honor's charge.

The Court: That is just a narrow question that you have now to determine.

The jury again retired and subsequently returned and reported that they found a verdict in favor of the plaintiff.

Mr. Keating: I move to set the verdict aside on all the grounds mentioned in Section 999 except it is inadequate.

The Court: The motion will be denied.

Mr. Keating: I take an exception.

The Court: Now, gentlemen, do you want to make any motions?

Mr. Keating: Mr. Nolan and I have been discussing this other

matter and I think we have concluded that the best procedure to protect my rights would be to direct the jury to bring in a verdict for the plaintiff rather than exclude the testimony——

106 The Court: Very well, I will let it all go in.

Gentlemen of the jury, in order that the record may show what my views upon this subject are at this time, I am holding that in the ordinary case the law is well settled that where a broker is employed to bring about the sale of property, such as is the subject matter of this contract, to wit, a steamship, and brings to the seller a buyer ready, willing and financially able to enter into an agreement with the seller for the purchase of his property upon the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, and as here a contract expressing those terms is actually entered into, the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete the contract.

Therefore I say to you, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts the party produced by the broker who is ready and willing to and does accept the terms fixed by the seller, and the party is satisfactory to the seller and the contract is made.

I am holding as a matter of law that what happened here in respect to the existence of British law, and the failure to carry out the contract by the seller owing to the conversation had with the British Vice Consul and the condition of the British law, is not a legal ground so as to keep the broker from earning his commissions agreed to be paid to him.

107 It is the undisputed evidence in this case that the plaintiff Warner was employed to produce a purchaser; that he did produce Templeman and Moulton; that a contract was signed upon terms that at that time were satisfactory to the seller; 2½ per cent commission was agreed to be paid upon the purchase price of $475,000. $125 on account of that commission was paid to Mr. Warner at the time. The balance has not been paid to the plaintiff Warner. Demand has been made therefor, and still it has not been paid, and consequently I will direct you in view of your special finding that was submitted to you and upon what I conceive to be the principles of law applicable to the litigation between the parties here, to render a verdict for the plaintiff in the sum of $11,750, with interest thereon from March 12th, 1917.

Mr. Keating: Will your Honor give me an exception to each and every part of your charge?

The Court: Yes; to each proposition of law that I have laid down in my charge you may have an exception.

Mr. Keating: There is no necessity of my going through the formality of asking you to charge differently?

The Court: Except for the purpose of making your record clear.

Mr. Keating: I ask your Honor to charge the jury that if they believe the evidence to the effect that the contract under the British law was illegal and void, that that would constitute a good defense to this action.

The Court: I will take that question from the jury.
Mr. Keating: Exception.

108 As directed by the Court the jury then returned a verdict in favor of the plaintiff for the sum of $11,750 with interest from March 12, 1917.

Mr. Keating: I move to set aside the verdict on the ground it is contrary to law and contrary to the evidence, and on all the other grounds mentioned in Section 999 except that the verdict is inadequate.
The Court: That motion will be denied with an exception to the defendant.
Mr. Keating: I take an exception.

Execution stayed 30 days after entry of judgment.

109 PLAINTIFF'S EXHIBIT No. 1.

The Globe Line.

Gaston, Williams & Wigmore Steamship Corporation.

Office of Vice President & Gen'l Manager,

120 Broadway, New York.

[FLAG.]

J. B. Austin, Jr., Vice Pres. & Gen. Mgr.

December 11th, 1916.

Mr. P. A. Warner,
30 Church Street,
New York City.

DEAR SIR:

Referring to our conversation this afternoon, I beg to advise that you are authorized to offer the steamer "Eskasoni" for sale for four hundred and seventy-five thousand dollars, $475,000.00.
Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers.

Yours very truly,

J. B. AUSTIN, JR.,
Vice Pres. & Gen. Mgr.

J. B. A., Jr./M.

110 PLAINTIFF'S EXHIBIT No. 2.

Time Charter of Steamship "Eskasoni."

This Charter-Party made and concluded in the City of New York on the twelfth day of December, 1916, between Gaston, Williams & Wigmore of Canada, Limited, a corporation of the Dominion of Canada, having its principal office in Toronto, Ontario, hereinafter

called the "Owner," the owner of the British screw steamship Eskasoni of St. Johns, Newfoundland, and Philip Templeman and George A. Moulton, subjects of the Kingdom of Great Britain and Ireland and residents of the Crown Colony of Newfounduand, hereinafter called the "Charterers,"

Witnesseth, That

Whereas, the Owner is the owner of the British Steamship Eskasoni, of St. Johns, Newfoundland, of 2671 tons gross and 1686 tons net register, and about 4357 tons deadweight of about 218,000 cubic feet capacity, and classed 100-A1 in British Lloyds, now repairing at Liverpool and expected to sail for New York, and does not make any guaranty or warranty of any kind with regard to said steamship, except that she shall be classed as aforesaid on delivery to the Charterers hereunder, and

Whereas, The Owner has agreed to charter and sell the steamship Eskasoni for Four Hundred Seventy-five Thousand Dollars ($475,000) United States Gold, to be paid to it, or to its agent or nominee at the termination of this charter-party, in accordance with
111 and subject to the same terms and conditions hereof, and

Whereas the charterers have agreed to charter and purchase the said steamship Eskasoni for said amount and on said terms:

Now, therefore, it is hereby agreed, by and between the Owner and the Charterers in consideration of the payment to the Owner of the sum of Five Thousand Dollars ($5,000), on account of the charter hire payable hereunder, the receipt whereof is hereby acknowledged, and of the mutual promises and undertakings hereinafter contained, as follows:

First. Term and Limits—The Owner agrees to let and the Charterers agree to hire the steamship Eskasoni from the time of her delivery for a period of eight (8) months, the steamer to be placed at the disposal of the Charterers at New York, on performance by them of the conditions hereinafter contained, to be employed as the Charterers or their Agents shall direct in carrying lawful merchandise between ports and among all ports in the world, except in the Mediterranean Sea, east of the west coast of Italy, the Baltic, the White Sea and North Sea; unless with the written consent of the Owner, but trading with Alexandria, Egypt, shall be permitted, all provided full insurance can be and is placed as herein provided.

Second. Expenses of Operation—The Charterers agree:

(*a*) To provide and pay for all coals, fuels, fresh water,
112 stores, provisions, insurances, port charges, pilotages, agencies, commissions, and all wages of the captain, officers, engineers, firemen and crew;

(*b*) To maintain the said steamship in the same condition in which she is delivered to them;

(*c*) To make any repairs that may become necessary for any reason whatsoever at their own expense, and

(*d*) To operate the said steamship under this charter-party free of any expense to the Owner of any nature or kind whatsoever.

Third. Coal, etc., on Board—The Charterers agree to take over and pay for all coals, fuels and stores on board the said steamship at the time of her delivery at the current market price at the port of delivery on the date thereof.

Fourth. Hire and Payments—The Charterers agree to make payments to the Owner in United States Gold or its equivalent at the office of its agents, Gaston, Williams & Wigmore Steamship Corporation, 120 Broadway, Borough of Manhattan, New York City, for the use and hire of the steamship Eskasoni for the said period as follows:

(*a*) Five Thousand Dollars ($5,000) on the signing of this charter-party.

(*b*) Twenty Thousand Dollars ($20,000) within seven (7) days after said steamship shall have left Liverpool, notification
113 whereof shall be in writing and shall be given to the Charterers.

(*c*) One Hundred Seventy-five Thousand Dollars ($175,000) on the completion of the loading for her first voyage from the Port of New York. The Owner agrees that the steamer shall be in a seaworthy condition, with her class, above mentioned, maintained. Loading of the cargo for the first voyage shall be under the supervision of the Owner, but the Charterers shall be and remain responsible for the same; and the Charterers shall deliver to the Owner, before the Charterers shall commence said loading, a valid freight contract, or contracts, satisfactory to the Owner, and obtained by the Charterers and assigned to the Owner, the prepaid freight whereon shall be in excess of $175,000. Any excess over said amount, collected by the Owner under said freight contracts shall be turned over to the Charterers, less any charges for ship's account properly payable by the Charterers, which have been paid by the Owner.

It is further expressly understood and agreed that the loading of said vessel shall be completed within twenty working days after notice to the Charterers that said vessel is ready to receive cargo, and the failure of the Charterers to so load the vessel shall be deemed a breach of this charter-party.

(*d*) One Hundred Thirty-seven Thousand Five Hundred Dollars ($137,500) one hundred and forty (140) days after
114 notice to the Charterers that said vessel is ready to receive cargo for the first trip.

(*e*) One Hundred Thirty-seven Thousand Five Hundred Dollars ($137,500) two hundred and forty (240) days after notice to the Charterers as provided in sub-division (*c*) hereof.

Fifth. Insurance—The Charterers agree:

(*a*) To obtain and pay for insurance on the said steamship in policies to be approved by and made payable to the Owner, as follows:

1. A policy of full Protection and Indemnity Insurance including insurance against liability for injury to or death of persons, and against Employer's and Workman's Compensation liability during the period of the charter-party.

2. Policies insuring the said steamship against Fire and all Marine and War Risks to the amount of Three Hundred Thousand Dollars ($300,000) covering, in each case, a round trip at and from port or ports in the United States of America to Europe, or to any other ports allowed herein, at and from port or ports there and return to port or ports in the United States.

(*b*) To keep the said steamship so insured during the period of this charter-party, and not to do, suffer or permit any act to be done whereby the said insurance shall be or shall become liable to be vitiated or forfeited in whole or in part.

115 (*c*) To deliver the policy of Protection and Indemnity Insurance, hereinabove mentioned, to the Owner, or its agent, at the time of the delivery of the said steamship to the Charterers, and to deliver to the Owner, or its agent, the Marine and War Risk policies, hereinabove mentioned, before the said steamship shall sail from the United States on any voyage under this charter-party.

(*d*) The Charterers shall have the benefit of any insurance upon said vessel, the term whereof shall not have expired at the time of the delivery of the steamer to the Charterers, in New York, provided the Charterers shall pay to the Owner the proportionate unearned premiums thereon.

Sixth. Indemnity by Charterers—The Charterers hereby indemnify and agree to hold the Owner and the steamship Eskasoni harmless of and from all liens, charges, encumbrances, suits, actions, proceedings, claims, costs and expenses, of every nature and kind whatsoever, arising out of or in any way connected with the operation of the said steamship under this charter-party.

Seventh. Warranty against Liens—The Charterers agree that:

(*a*) They will not intentionally incur, or permit to be incurred during the period of this charter-party any indebtedness which might constitute a lien on the said steamship:

116 (*b*) If, notwithstanding, such indebtedness should be incurred, the Charterers will at once have prepared and delivered to the Owner a bond executed by a surety company satisfactory to the Owner conditioned in favor of the Owner for the payment of the amount of such indebtedness within ten (10 days; or shall file in court a sufficient bond to release the vessel from custody.

(*c*) That in default of the delivery of such bond, or the payment as provided therein of such indebtedness, the entire unpaid balance of the charter hire provided for herein shall immediately become due and payable.

Eighth. Bonding of Suits—The Charterers agree that if, at any time, any suit or proceedings shall be brought against the said steamship to enforce any lien, or if the said steamship shall be attached, the Charterers shall give a bond freeing the said steamship from the lien or attachment within ten (10) days after such proceedings shall have been commenced.

Ninth. Master, Engineers and Officers—The Charterers agree:

(*a*) That they will retain the present captain and chief engineer of the said steamship in their employ as captain and chief engineer, respectively, of said steamship throughout the term of this charter-party, unless the Owner shall consent, in writing on due cause shown, to their removal, or to the removal of either of them; and,
117 in that event, the Owner shall have the right to nominate another captain and chief engineer satisfactory to the Owner;

(*b*) That the Owner may nominate, by letter to the Charterers, a new captain, or chief engineer, or any other officers or engineers on the said steamship whom it may desire, and the Charterers will employ any officer or engineer so nominated;

(*c*) That, notwithstanding the provisions of this paragraph, the captain, engineers, officers and crew shall, from the time of the delivery of said steamship under the charter-party to the Charterers, be the employes of the Charterers only and shall be paid by the Charterers only, as hereinabove provided.

Tenth. Exceptions—The Charterers agree:

(*a*) That is the steamship Eskasoni shall fail to arrive at the port of New York within one hundred sixty (160) days from the date hereof, owing to perils of the sea, fire, barratry of master and crew, enemies, pirates, collision, stranding or any other accident of navigation, explosion, bursting of boilers, breakage of shafts or defects in machinery or hull in the said steamship, even though said accidents may be occasioned by the negligence, default or error in judgment of the Owner, *pliot*, master, mariner or other servants of the Owner, this charter-party shall, at the option of the Char-
118 terers, be void, and any sums paid hereunder shall at once be repaid by the Owner to the Charterers.

Eleventh. Loss after Delivery—The Charterers agree that, in the event of the total or constructive total loss of the said steamship from any cause after delivery to the Charterers hereunder, this charter-party shall terminate, but that any payment which may have been made to the Owner by the Charterers hereunder shall be deemed to have been earned and shall not be repayable to the Charterers.

Twelfth. Licenses and Permits—The Charterers agree to procure from the British or Dominion Governments or the Government of Newfoundland, as may be necessary, any licenses or permits which may now be, or which may hereafter become necessary as a condition of entering into any trade in which the Charterers may wish to employ the said steamship, and to comply in all respects with the said licenses and permits and with any laws and governmental proclamations, rules, regulations and/or restrictions which may be applicable to the said steamship of a British steamship —.

Thirteenth. Log Books and Instructions to Master—The Charterers agree:

(*a*) To furnish to the Owner at the termination of each voyage a certified abstract of the deck and engine-room logs of the said steamship for the said voyage.

119 (*b*) To deliver to the Owner at the time of the signing of this charter-party a letter signed by the Charterers in the form hereto annexed, which is to be signed by the Owner and delivered by it to the Captain of the said steamship.

Fourteenth. Charter-Party Not Assignable—The Charterers agree that they will not sell or assign this charter-party unless the Owner shall consent to a sale or assignment thereof in writing.

Fifteenth. Sub-Chartering—The Charterers shall have the right to sub-charter the said steamship without prejudice to the terms and conditions of this charter-party on the written approval of the Owner. In the event of the Charterers sub-chartering the said steamship, they agree that the Owner shall have a lien on all cargoes and all sub-freights for any amounts due under this charter-party.

Sixteenth. Default of Charterers—If, at any time after the delivery of the said steamship to the Charterers hereunder, the Charterers shall fail to perform any of their agreements herein made, the whole amount of the charter hire shall at once become due and payable, and the Owner shall have the right at any time after such default of the Charterers to withdraw the said steamship from the charter-party and from the service of the Charterers, whereupon all rights and claims against the Owner or said vessel arising in
120 favor of the Charterers hereunder shall cease and determine without prejudice to any claims which the Owner may have hereunder against the Charterers for any unpaid balance of charter hire of the said steamship which may then be due, and without prejudice to any other claim which the Owner may have against the Charterers hereunder.

Seventeenth. Bill of Sale—At the termination of this charter-party, or at any time prior thereto, if the Charterers shall have performed all the obligations assumed by them hereunder and shall have paid to the Owner, or to its nominee, or its agent, Gaston, Williams & Wigmore Steamship Corporation, at 120 Broadway, Borough of Manhattan, New York City, the full amount of the char-

ter hire hereinbefore provided, the Owner will deliver to the Charterers or to any person by them authorized in writing, at the office of its said agent, a Bill of Sale on the British Board of Trade form then current in which the Charterers shall be named as Vendee and which shall contain a warranty against any such liens, charges or encumbrances on or against the said steamship as may have arisen by reason of occurrences prior to the delivery of the said steamship to the Charterers under this charter-party.

Eighteenth. Parties Obligated—It is mutually agreed that this charter-party shall be binding on the Owner, its successors and assigns, and shall be jointly and severally binding on the Charterers, their heirs, executors and personal representatives.

121 In witness whereof, Gaston, Williams & Wigmore of Canada, Limited, has caused these presents to be executed in duplicate by its Vice-President, and Philip Templeman and George A. Moulton have executed these presents in duplicate the day and year first above written.

GASTON, WILLIAMS & WIGMORE OF CANADA, LIMITED,
Owners,

By J. B. AUSTIN, Jr.,
Vice-President.

PHILIP TEMPLEMAN,
GEORGE A. MOULTON,
Charterers.

December 12, 1916.

Captain W. O. JARVIS,
Master of the British Steamship Eskasoni.

DEAR SIR:

This is to advise you that the steamship Eskasoni has been chartered to Philip Templeman and George A. Moulton, of Newfoundland, on a form of time charter-party, a copy of which is enclosed for your information.

122 This is also to advise you that under the terms of that charter you are to send to Gaston, Williams & Wigmore Steamship Corporation at 120 Broadway, New York City, at the termination of each voyage of the steamship Eskasoni under said charter, a certified abstract of the deck and engine-room logs of the said steamship for said voyage.

You are also to advise fully Gaston, Williams & Wigmore Steamship Corporation, at 120 Broadway, New York City, at once, by cable, telegram or wireless, sent at Charterers' expense.

1. In the case of any accident happening to or on board the steamship Eskasoni of any nature or kind, or in case the said steamship becomes involved in the salvage of any other vessel.

2. In the event that any suit, lien or attachment is commenced against or placed on the steamship Eskasoni, or in the event of any governmental restraint of any nature or kind being exercised upon her by any government.

3. Before any contract for any repairs to the steamship Eskasoni is let.

You will observe from the ninth clause of the charter-party that you are, under the terms of said charter-party, in the employ of the charterers only, but that the owner retains the right to nominate another master, chief engineer, or other officers, or engineers, at any time it may desire to do so.

123 We are addressing this joint letter to you under the thirteenth clause of the charter-party.

Very truly yours,

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD.,
Owners.

By J. B. AUSTIN, Jr.,
Vice-President.

PHILIP TEMPLEMAN,
GEORGE A. MOULTON,
Charterers.

PLAINTIFF'S EXHIBIT No. 3.

Know all men by these presents, that I, George A. Moulton, a resident of the Crown Colony of Newfoundland, in consideration of the sum of One ($1.00) Dollar, lawful money of the United States, to me in hand paid, the receipt whereof is hereby acknowledged, and for other good and valuable considerations, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto Philip Templeman, also a resident of the Crown Colony of Newfoundland, his executors, administrators and assigns, for his or their own proper use and benefit forever, all my right, title
124 and interest in and to a Charter-Party, heretofore made and concluded in the City of New York, on the 12th day of December, 1916, by and between the said Philip Templeman, and the undersigned referred to herein as the "Charterers," and Gaston, Williams and Wigmore of Canada, Limited, a corporation of the Dominion of Canada, having its principal office at Toronto, Ontario, referred to therein as the "Owner", for the charter and use of the British steamship "Eskasoni," subject nevertheless, to the terms and conditions therein mentioned.

And I do hereby authorize and empower the said Philip Templeman, his executors, administrators and assigns, upon the performance of the said terms and conditions contained in the said Charter-Party, to demand and receive of the said Gaston, Williams and Wigmore of Canada, Limited, the hire of said vessel to be given therein, in the same manner to all intents and purposes as we to-

gether or I myself might, or could do, were these presents not executed.

In witness whereof, I have hereunto set my hand and seal this thirteenth day of April, 1917.

[SEAL.] GEORGE A. MOULTON.

In the presence of
WILLIAM S. DENTON.
W. E. KAINE.

125 PLAINTIFF'S EXHIBIT No. 4.

Ch. 21, L. 1915, Act to Restrict the Transfer of British Ships.

5 Geo. 5—Chapter 21.

An Act to Restrict the Transfer of British Ships to Persons Not Qualified to Own British Ships (16th March, 1915).

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. A transfer made after the twelfth day of February, 1915, of a British ship registered in the United Kingdom, or a share therein, to a person not qualified to own a British ship, shall not have any effect unless the transfer is approved by the Board of Trade, on behalf of His Majesty, and any person who makes or purports to make, such a transfer after the commencement of this Act without that approval shall, in respect to each offense, be guilty of a misdemeanour.

2. This Act shall apply to British ships registered at foreign ports of registry and to British ships registered in any British possession other than those mentioned in the Schedule to this act as it applies to British ships registered in the United Kingdom.

126 3—(1)—This act shall be cited as the British Ships (Transfer Restriction) Act, 1915, and shall be read as one with the Merchant Shipping Acts 1894 to 1914.

(2) This act shall have effect only during the continuance of the present war.

Schedule.

British India.
The Dominion of Canada.
The Commonwealth of Australia (including Papua and Norfolk Island).
The Dominion of New Zealand.
The Union of South Africa.
Newfoundland.

127 DEFENDANT'S EXHIBIT A.

The Globe Line.

Gaston, Williams & Wigmore Steamship Corporation

Office of Vice President & Gen'l Manager, 120 Broadway, New York.

[Flag.]

J. B. Austin, Jr., Vice Pres. & Gen. Mgr.

April 12, 1917.

Mr. Philip Templeman and Mr. George A. Moulton, 42 Broadway, New York, N. Y.

GENTLEMEN:

Enclosed herewith you will find our check for $4,966.25, being the amount deposited by you with us on account of the charter of the s/s "Eskasoni," less $33.75, which is the amount of the exchange which we were obliged to pay on the check handed us by Mr. Templeman.

As you know, we were notified that this check had gone to protest but subsequently the amount was paid and credited to our account on April 6th by the Guaranty Trust Company, and we, therefore, are sending you our check as above.

128 Pursuant to conversation between our Messrs. Austin and Martin and your good selves, in regard to the cancellation of this Charter-Party, owing to circumstances beyond our mutual control, we are returning herewith cancelled copy of the Charter-Party which you left with us, and we request that you destroy the signatures on your copy of the Charter-Party and return the same to us—thus disposing of this matter definitely.

Very truly yours,

J. B. AUSTIN, JR.,
Vice Pres. & General Manager.

R. H. L. M./J. L. H.

129 *Order Settling Bill of Exceptions.*

United States District Court, Southern District of New York.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant.

The foregoing bill of exceptions contains all the evidence and testimony in any way material to the exceptions sought to be reviewed

and the Court hereby signs and orders this bill of exceptions to be filed this — day of June, 1920.

JOHN C. KNOX,
U. S. D. J.

130 *Stipulation Settling Bill of Exceptions.*

United States District Court, Southern District of New York.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant.

It is hereby stipulated, pursuant to the rules of this Court that the foregoing bill of exceptions contains a full and complete transcript of the evidence and proceedings had in the United States District Court for the Southern District of New York in the above entitled action, and it is hereby agreed upon as the bill of exceptions upon the writ of error to the United States Circuit Court of Appeals for the Second Circuit and that the same be ordered filed as such.

New York, June —, 1920.

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Attorneys for Plaintiff-in-Error.
JOSEPH P. NOLAN,
Attorney for Defendant-in-Error.

131 *Petition for Writ of Error.*

United States District Court, Southern District of New York.

At Law.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant.

Now comes Gaston, Williams & Wigmore of Canada, Ltd., the defendant, by Kirlin, Woolsey, Campbell, Hickox & Keating, its attorneys, and says:

On or about the 10th day of March, 1920, this court entered a judgment herein in favor of the plaintiff and against the defendant for the sum of $14,086.63 damages and costs, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which more in detail appear from the assignments of error which are filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in his behalf to the United States Circuit Court of Appeals for the Second

Circuit for the correction of the errors so complained of, and to have such judgment reviewed and reversed, and that a transcript
132 of the record and the papers and proceedings in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, March 24, 1920.

KIRLIN, WOOLSEY, CAMPBELL, HICKOK & KEATING,
Attorneys for Defendant.

133 *Assignments of Error.*

United States District Court, Southern District of New York.

PHILIP A. WARNER, Plaintiff,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant.

Now comes Gaston, Williams & Wigmore, of Canada, Ltd., the defendant in the above-entitled cause, and, in connection with the petition for a writ of error in this case, assigns the following errors, which the plaintiff-in-error avers occur-ed on the trial of the issues herein, and on which it relies to reverse the judgment entered as appears of record.

First. In that the Court excluded evidence, over the defendant's objection and exception, of the witness, Philip A. Warner, as shown by the following question:

"Q. In other words, Mr. Warner, you recognized that you had to have, you had to produce somebody who was not only ready and willing but who was able to buy?

134 Mr. Nolan: I object, if your Honor please.
The Court: I think I will sustain the objection to that.
Mr. Keating: I take an exception.
The Court: That is what he was required to do under the law to produce willing buyers at that time.
Mr. Nolan: And when they were accepted by the seller and the contract was signed, the contract was ended.
The Court: Unless he was a party to some other agreement.
Mr. Keating: I take an exception."

Second. In that the Court declined to grant the motion made at the close of the plaintiff's case to dismiss the complaint on the ground that the plaintiff had not made out a cause of action.

Third. In that the Court struck out evidence contained in the answer of the witness, John P. Martin, Jr., over the defendant's objection and exception, as appears from the following question and answer:

"Q. Then they had under that arrangement really from April 12, 1917, the day you returned the check, until the ship got here in July

or rather got to Philadelphia in July to take up any necessary measures towards straightening out this situation?

A. I would not say that because the contract provided that the seller, the parties to the transaction must be satisfactory to the British authorities.

135 Mr. Nolan: Now I move to strike that out as the contract does not provide any such thing in the first place and it is not responsive in the second.

The Court: Yes.

Mr. Keating: Now, just a minute. I want to make an objection at this time. This line of testimony is competent for the reason that we will establish that not only was this contract illegal and void under the British law but any negotiations looking to the purchase of a British ship was illegal and void under the Defense of the Realm Act and therefore not only a written contract looking to the purchase but any negotiations looking to the purchase were illegal and void also. I make an objection on that ground.

The Court: Objection overruled.

Mr. Keating: Exception."

Fourth. In that the Court excluded evidence of the witness, M. M. Richardson, over the defendant's objection and exception, and ruled that the question of whether the contract was illegal and void under British Law was immaterial, as appears by the following:

"Q. Do you recall how this matter came to your attention, Mr. Richardson?

A. Well, it is three years ago and I could not recall all the details but if my memory serves me right we were approached in the Consulate by Gaston, Williams & Wigmore with a view to ascer-
136 taining whether the proposed sale of this vessel with some clients they had in view would be approved.

Q. That is Moulton and Templeman?

A. Yes.

Q. And what did you do with that request?

Mr. Nolan: Now, if your Honor please, I object to this line of testimony as not at all binding upon the plaintiff.

The Court: What he is trying to do is trying to show the good faith of Gaston, Williams & Wigmore in the transaction.

Mr. Keating: And I am going to establish that this thing is absolutely illegal and void.

The Court: I am going to rule against you on the question on whether the plaintiff was bound by any laws that may have been enforced in Great Britain.

Q. Under the Circuit Court of Appeals decision, your Honor, I think it allows me to prove it.

The Court: I say upon the question of law I am going to rule against you.

Mr. Nolan: Then may I take one general exception to this line of questioning?

The Court: Yes.
Mr. Keating: Exception."

Fifth. In that the Court, over the defendant's objection
137 and exception, excluded the evidence of Eustace Conway, on the point as to the legality of the contract under British law, as appears from the following:

"Q. Well, Mr. Conway, will you give it, will you tell us whether or not in your opinion, that contract on page 70 was a good contract under British law?

Mr. Nolan: Oh, I object to that.
The Court: Yes, I think so.
Mr. Keating: Your Honor, just let me state our position a little bit. We have a decision under the Circuit Court of Appeals decision in this case by which it came back for a new trial. The Court said that this 39 *c. c.* only imposed a penalty for this, in other words, that it did not absolutely *forbade* the thing and make it illegal and void. Now we have a decision which says that this was only imposed as a penalty but absolutely made any dealings illegal and void and of no effect. Now, this man has testified he is suing for having procured that contract. Now, if what he has procured is something which is void and of no effect he cannot possibly recover. The agreement was to procure a purchaser. A man cannot be a purchaser unless there is something to buy or he is able to buy.
The Court: Isn't the contract to be construed by our law?
Mr. Keating: This contract?
The Court: Yes.
Mr. Keating: No. This was a sale of a British ship.
138 The Court: I think it depends upon the Law of the United States. That is, my theory of the case is that when he produced these purchasers there they had the right. Gaston, Williams & Wigmore had the right to scrutinize them and did not have to accept them, if they believed that they might not be able to buy or could not by reason of the existence of some British law carry out some contract they entered into.
Mr. Keating: What happened here was that Mr. Warner brought these two gentlemen in perfect good faith both on Mr. Warner's part and on our part as we testified we entered into this contract, signed this contract. We went down to the British Consulate's office and found it could not be done, that the action was absolutely forbidden and it was after that that we withdrew from the thing. It was not safe. We went blindly into the thing without knowing that it could not be done and agreed to do it and we were innocent. The same thing, suppose these men unknown to us had been Germans we would have approved them just the same if we had known and even Mr. Warner has——
The Court: I am going to rule against you on the question of law when it comes down to that.

A. I had not quite finished. Section 48 also in addition, "Any person who attempts to permit or procure, aids or abets or does

any act preparatory to the commission of any act prohibited
139 by these regulations or harbors any person whom he knows or has reasonable grounds for supposing to have acted in contravention of these regulations shall be guilty of an offense against these regulations."

Q. Have you finished, Mr. Conway?
A. Yes.

Mr. Keating: Now I understand I am to be allowed to question the witness but your Honor will strike it out.
The Court: Yes.

Q. Mr. Conway, will you tell us what your opinion is as to the effect on the British law of that proposed, of that contract, Plaintiff's Exhibit 2?

Mr. Nolan: For the purpose of the record I will take an objection.
The Court: Yes.
Mr. Keating: Exception.

A. In my opinion it was absolutely illegal and against public policy."

Sixth. In that the Court admitted in evidence, over defendant's objection and exception, plaintiff's exhibit No. 3, being an assignment from Moulton to Templeman.

Seventh. In that the Court excluded, over the defendant's objection and exception, evidence of the witness, William H. Ellis, on custom, as appears from the following questions and answers:

140 "Q. Suppose the deal is supposed to be consummated and the parties brought together, but the steamer is not actually sold, is it or not the custom of the trade that the brokerage is paid?

Mr. Nolan: I object to that as indefinite.
The Court: Yes, objection sustained.

Q. Assuming, Mr. Ellis, that a contract is signed which cannot be enforced for some reason?
A. Yes.
Q. And the ship is never sold?

The Court: And never delivered.

Q. And never delivered, is there any custom as to whether any brokerage is payable under those circumstances in New York?

Mr. Nolan: My testimony as to that was in rebuttal, so I would like to preserve the same objection. I take objection and exception.
The Court: Yes."

Eighth. In that the Court denied the motion of the defendant to dismiss the complaint after all the evidence was in.

Ninth: In that the Court refused to charge the jury as requested by the defendant, as follows:

141 "Mr. Keating: If your Honor please, I ask you to instruct the jury that it was Mr. Warner's duty, in going into the business of ship brokerage, to familiarize himself with the customs of that trade.

The Court: Denied."

Tenth. In that the Court, over the defendant's objection and exception charged the jury as follows:

"The merits of this case have nothing to do with it at all. It is simply where there is a custom in the trade, as I charged you this morning, when the buyer falls down through the action of the person who is selling the ship, or through his cancellation of the contract.

Mr. Keating: I take an exception that part of your Honor's charge."

Eleventh. In that the Court denied the defendant's motion to set aside the verdict of the jury on all the grounds mentioned in Section 999 of the Code of Civil Procedure, except as to the inadequacy of damages.

Twelfth. In that the Court charged the jury, over the defendant's objection and exception, as follows:

"Gentlemen of the jury, in order that the record may show what my views upon this subject are at this time, I am holding that in the ordinary case the lay is well settled that where a broker
142 is employed to bring about the sale of property, such as is the subject matter of this contract, to wit, a steamship, and brings to the seller a buyer ready, willing and financially able to enter into an agreement upon the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, and as here a contract expressing those terms is actually entered into, the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete the contract.

Therefore, I say to you, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts the party produced by the broker who is ready and willing to and does accept the terms fixed by the seller. and the party is satisfactory to the seller and the contract is made."

Thirteenth. In that the Court charged the jury, over the defendant's objection and exception, as follows:

"I am holding as a matter of law that what happened here in respect to the existence of British law, and the failure to carry out the contract by the seller owing to the conversation had with the British Vice Consul and the condition of the British law, is not a legal
143 ground so as to keep the broker from earning his commissions agreed to be paid to him.

It is the undisputed evidence in this case that the plaintiff Warner

was employed to produce a purchaser; that he did produce Templeman and Moulton; that a contract was signed upon terms that at that time were satisfactory to the seller; 2½% commission was agreed to be paid upon the purchase price of $475,000. $125 on account of that commission was paid to Mr. Warner at the time. The balance has not been paid to the plaintiff Warner. Demand has been made therefor, and still it has not been paid and consequently I will direct you in view of your special finding that was submitted to you and upon what I conceive to be the principles of law applicable to the litigation between the parties here, to render a verdict for the plaintiff in the sum of $11,750, with interest thereon from March 12th, 1917.

Mr. Keating: Will your Honor give me an exception to each and every part of your charge?

The Court: Yes: to each proposition of law that I have laid down in my charge you may have an exception."

Fourteenth. In that the Court directed that the jury find a verdict in favor of the plaintiff.

Fifteenth. In that the Court declined to charge the jury as follows:

144 "Mr. Keating: I ask your Honor to charge the jury that if they believe the evidence to the effect that the contract under the British law was illegal and void, that that would constitute a good defence to this action.

The Court: I will take that question from the jury.

Mr. Keating: Exception."

Sixteenth. In that the Court refused to grant the motion of the defendant to set aside the general verdict of the jury, on the ground that the verdict was contrary to law and contrary to the evidence, and on all the grounds mentioned in Section 999 of the Code of Civil Procedure, except that the verdict is inadequate.

Wherefore, the plaintiff-in-error prays that the judgment of the said Court be reversed.

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctors for Plaintiff-in-Error.

Office and P. O. Address, 27 William Street, New York City.

Citation.

145 By the Honorable LEARNED HAND, *D. J.*

To Philip A. Warner, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit to be holden at the Borough of Manhattan, City of New York, in the District and Circuit above named on the 23rd day of April, 1920, pursuant to writ of error filed in the Clerk's office of the District

Court of the United States for the Southern District of New York, wherein Gaston, Williams & Wigmore of Canada, Ltd., is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named this 24th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty, and of the Independence of the United States the One Hundred and Forty-Fourth.

LEARNED HAND,
U. S. D. J.

146 *Bond on Appeal.*

District Court of the United States of America, for the Southern District of New York. In the Second Circuit.

PHILIP A. WARNER, Complainant-Respondent,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant-Appellant.

Bond on Appeal.

Know all men by these presents, That Gaston, Williams & Wigmore of Canada, Ltd., as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Philip A. Warner in the sum of Two Hundred and Fifty ($250.00) Dollars to be paid to the said Philip A. Warner for the payment of which well and truly to be made, said
147 principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 25th day of March, 1920.

Whereas, the above named Gaston, Williams & Wigmore of Canada, Ltd., has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Gaston, Williams & Wigmore of Canada, Ltd., shall prosecute said writ to effect, and answer all costs if it fails to make

said writ good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

GASTON, WILLIAMS & WIGMORE
OF CANADA, LTD.,
J. B. AUSTIN, JR.,
Vice-Pres. & Genl. Mgr.
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Vice-President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

148 STATE OF NEW YORK,
County of New York, ss:

On this 29th day of March, 1920, before me personally came the within named J. B. Austin, Jr., to me known, and known to me to be the individual described in and who executed the within bond and he acknowledged that he executed the same.

WM. E. SMITH,
Notary Public, Kings County.

Certificate filed in New York County.

Affidavit, Acknowledgment, and Justification by Guaranty or Surety Company.

STATE OF NEW YORK,
County of New York, ss:

On this 25th day of March, 1920, before me personally came Wm. A. Thompson, known to me to be the Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Gaston, Williams & Wigmore of Canada, Ltd., as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Vice-President of said Company, and knows the corporate
149 seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Gaston, Williams & Wigmore of Canada, Ltd., is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Vice-President of said Company, and that he is acquainted with E. M. McCarthy, and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company unencumbered and liable to execution exceed its debts and liabilities of

every nature whatsoever, by more than the sum of Ten Million dollars.

WM. A. THOMPSON,
(Deponent's Signature.)

Signed, sworn to, and acknowledged before me this 25th day of March, 1920.

F. E. FIELDS,
Notary Public, etc.

150 STATE OF NEW YORK,
County of New York, ss:

On this 29th day of March, 1920, before me personally came J. B. Austin, Jr., to me known, who, being by me duly sworn, did depose and say that he resides in Garden City, N. Y.; that he is the Vice-Pres. & Gen'l Mgr. of the Gaston, Williams & Wigmore of Canada, Ltd., the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

WM. E. SMITH,
Notary Public, Kings County.

Certificate filed in New York County.

151 *Bond on Appeal.*

District Court of the United States of America for the Southern District of New York, in the Second Circuit.

PHILIP A. WARNER, Complainant-Respondent,

against

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Defendant-Appellant.

Bond on Appeal.

Know all men by these presents, That Gaston, Williams & Wigmore of Canada, Ltd., as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Philip A. Warner in the sum of Fifteen Thousand Five Hundred ($15,500.00) Dollars to be paid to the said Philip
A. Warner for the payment of which well and truly to be
152 made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these present. Sealed and dated the 25th day of March, 1920.

Whereas, the above named Gaston, Williams & Wigmore of Canada, Ltd., have prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Gaston, Williams & Wigmore of Canada, Ltd., shall prosecute said writ to effect, and answer all damages and costs if it fails to make said writ good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD.
J. B. AUSTIN, Jr.,
Vice-Pres. & Genl. Mgr.
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Vice-President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

153 STATE OF NEW YORK,
County of New York, ss:

On this 29th day of March, 1920, before me personally came the within named J. B. Austin, Jr., to me known, and known to me to be the individual described in and who executed the within bond and he acknowledged that he executed the same.

WM. E. SMITH,
Notary Public, Kings County.

Certificate filed in New York County.

Affidavit, Acknowledgment, and Justification by Guaranty or Surety Company.

STATE OF NEW YORK,
County of New York, ss:

On this 25th day of March, 1920, before me personally came Wm. A. Thompson, known to me to be the Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Gaston, Williams & Wigmore of Canada, Ltd., as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly in-
154 corporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Gaston, Williams & Wigmore of Canada, Ltd., is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he

signed his name thereto by like authority as Vice-President of said Company, and that he is acquainted with E. M. McCarthy, and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Ten Million dollars.

WM. A. THOMPSON.
(Deponent's Signature.)

Signed, sworn to, and acknowledged before me this 29th day of March, 1920.

F. E. FIELDS,
Notary Public, etc.

255 STATE OF NEW YORK,
County of New York, ss:

On this 29th day of March, 1920, before me personally came J. B. Austin, Jr., to me known, who, being by me duly sworn, did depose and say that he resides in Garden City, N. Y.; that he is the Vice-Pres. & Gen'l Mgr. of the Gaston, Williams & Wigmore of Canada, Ltd., the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

WM. E. SMITH,
Notary Public, Kings County.

Certificate filed in New York County.

256 *Stipulation.*

United States District Court, Southern District of New York.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Plaintiff in Error, (Defendant Below),

vs.

PHILIP A. WARNER, Defendant in Error, (Plaintiff Below).

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, September 7th, 1920.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Plaintiff in Error.

JOSEPH P. DOLAN,
Attorney for Defendant in Error.

157 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Plaintiff-in-Error, (Defendant Below),

vs.

PHILIP A. WARNER, Defendant-in-Error, (Plaintiff Below).

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 7th day of September, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred and forty-fifth.

ALEX. GILCHRIST, JR.,
Clerk.

[SEAL.]

158 United States Circuit Court of Appeals for the Second Circuit.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Plaintiff-in-Error, (Defendant Below),

against

PHILIP A. WARNER, Defendant-in-Error, (Plaintiff Below).

Before Ward, Rogers and Hough, Circuit Judges.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Plaintiff-in-Error.
Cletus Keating, L. De Grove Potter, Counsel.
Joseph P. Nolan, Attorney for Defendant-in-Error.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

The plaintiff-in-error was defendant below and will be referred to hereinafter as defendant. The defendant-in-error was plaintiff below and will be referred to hereinafter as plaintiff.

The plaintiff is a citizen of the State of New York residing in the Southern District thereof.

The defendant is a corporation organized under the laws
159 of the Dominion of Canada and having an office for the transaction of business in the Southern District of New York.

The case is stated in the opinion.

Rogers Circuit Judge. The plaintiff was in the ship brokers business and he has brought this action to recover the sum of $11,675.00 which he alleges to be due to him as a commission for finding a purchaser for the British screw S. S. Eskasoni of St. Johns, Newfoundland at the price of $475,000.00.

The case has been in this court before. 261 Fed. 993. At that time the right of the plaintiff to recover was sustained, and judgment for defendant was reversed. A new trial has been had and a judgment has been entered for the plaintiff. The case now presented differs in material respects from the case when it came here before.

It is alleged that on December 11th and 12th 1918, the defendant was the owner of the steamship and that it agreed with the plaintiff that if he should succeed in finding a purchaser for the boat at the price of $475.000.00 the defendant would pay to the plaintiff the sum of 2½ per cent upon such purchase price for his services in the matter.

It is further alleged that thereafter the plaintiff procured Philip Templeman and George A. Moulton as purchasers of the
160 steamship, who thereupon began negotiations for the same and who thereafter entered into a contract of purchase and charter for the steamship with the defendant for the purchase price of $475,000. It is claimed that the sale was effected through the efforts of the plaintiff. Nothing has been paid to the plaintiff except the sum of $125.00 which was paid to him on March 15, 1917.

The plaintiff has obtained a verdict for $11,750 with interest from March 12, 1917.

It is admitted that the defendant at the time alleged was the owner of the vessel and that it entered into the agreement with the plaintiff that he alleges. It is also admitted that the plaintiff procured Philip Templeman and George A. Moulton as purchasers of the vessel, and that they thereafter entered into an attempted contract with the defendant for the purchase and charter of the steamship at the price of $475,000, and that they paid down $5,000 on the execution of the alleged contract and that the defendant paid 2½ per cent of that amount to the plaintiff as a commission thereon.

But it appears that the purchase was not consummated and that neither the vendor nor the vendees were capable, under British law, of consummating it. The defendant, the owner of the vessel, and Templeman and Moulton were all of them subjects of the Kingdom of Great Britain and Ireland and residents of the Crown Colony of New Foundland. They were British subjects, and as such were subject to the laws, and commands and orders of the
161 British Government.

At the time of the alleged contract of purchase the defendant was bound by a contract which it had with the British Government wherein it agreed to comply with certain instructions and rules of the British Government in the operation of its vessels and agreed that it would not charter any vessel to anyone to whom the British Government objected.

There was put in evidence at the trial so much of the British Defense of the Realm Regulations as is quoted below. Those Regu-

lations, it is admitted, were in force at the time the alleged contract for the purchase and sale of the vessel was entered into between the defendant and Templeman and Moulton. Section 39 CC of the above Regulations reads as follows:

"A person shall not without permission in writing from the Shipping Comptroller directly or indirectly and whether on his own behalf or on behalf of or in conjunction with any other person, purchase or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel.

If any person acts in contravention of this regulation or if when any permission of the Shipping Comptroller has been granted under this regulation, subject to any conditions and the person to whom it was granted fails to comply with any such condition, he shall be guilty of an offense against these regulations."

It was argued that this regulation was obligatory upon the defendant and upon Templeman and Moulton being British subjects and as the ship was a British ship. Consent to the sale was never obtained from the British shipping Comptroller under section
162 39CC. When the defendant approached the British authorities at New York on the subject it was notified by the British Consul that the British Government would withhold its consent. Thereupon the defendant refused to consummate the sale and paid back to Templeman and Moulton the $5,000 paid by them to bind the contract.

At the trial a British barrister was permitted to testify as an expert in British law. He stated that the contract of sale which the defendant had made with Templeman and Moulton was void under British law. But in the opinion of the majority of this court and for reasons which will appear later it is not material whether the contract of sale was void under British law or not.

The court below declined to charge the jury as requested by the defendant that "if they believed the evidence to the effect that the contract under British law was illegal and void, that that would constitute a good defense to this action." This refusal was
163 excepted to at the time and has been assigned for error. It is also assigned for error that the court instructed the jury that the existence of British law was no defense to the action and in directing them to bring in a verdict for the plaintiff for the full amount claimed.

The law has long been firmly established that the lex loci rei sitæ determines the validity of a contract for the sale of real property.

It has been many times said that personal property has no locality but follows the person of the owner, mobilia sequuntur personam, and that the validity of its transfer must be determined according to the laws of the owner's domicil. The proposition, however, has also been denied. In Pullman's Palace Car Company v. Pennsylvania, 141 U. S. 18, 22, it was said:

"The old rule, expressed in the maxim mobilia sequuntur personam, by which personal property was regarded as subject to the

law of the owner's domicil grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which
164 could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs, the law of the place where the property is kept and used."

And in Buckley v. Honold 19 How. 390 the court held that the sale of a ship which was effected at New Orleans, the vendor having his domicil in New York, was governed by the laws of Louisiana where the contract was made and performed and not by the laws of New York. In that case both parties apparently had their domicil in the United States. In the case now before us the vendor and the vendee had a British domicil. That fact alone is not of controlling importance so far as the question now before this court is concerned. As between the parties the sale and delivery of a vessel passes the title at common law. The question of registration is another and distinct matter. The registration of a vessel is not compulsory but a privilege and advantage of which the purchasers may or may not avail themselves as they choose. In the argument in this court in the instant case the question of whether the validity of the contract for the sale of the ship depended upon the lex loci centractus, the lex loci celebrationis, or whether it depended upon the law of the domicil was not mooted.

The complaint alleges that defendant agreed with plaintiff that if plaintiff should succeed in finding a purchaser for the steamship Eskasoni at the price of $475,000 the defendant would pay to plaintiff the sum of 2½ per cent upon such purchase price for its services. Then the complaint goes on to allege that the plaintiff there-
165 after procured Philip Templeman and George A. Moulton as purchasers of the vessel and that they entered into a contract of purchase with defendant for the purchase price of $475,000. The truth of these allegations defendant expressly admitted in its answer.

While the action is brought against Gaston, Williams & Wigmore of Canada, Limited, plaintiff was employed directly not by that corporation which existed under the laws of the Dominion of Canada, but by another corporation known as Gaston, Williams & Wigmore Steamship Corporation which the record disclosed to be an "American Corporation," and which managed the affairs of the Canadian corporation. The evidence of the employment is in the following letter:

"The Globe Line.

Gaston, Williams & Wigmore Steamship Corporation.

Offices of Vice President & Gen'l. Manager, 120 Broadway, New York.

December 11th, 1916.

(Flag.)

J. B. Austin, Jr., Vice Pres. & Gen. Mgr.

Mr. P. A. Warner,
30 Church Street,
New York City.

DEAR SIR:

Referring to our conversation this afternoon, I beg to advise that you are authorized to offer the steamer 'Eskasoni' for sale for Four hundred and seventy-five thousand dollars ($475,000.00.)

Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers.

Yours very truly,

J. B. AUSTIN, JR.,
Vice Pres. & Gen. Mgr.

J.B.A., Jr./M.

166 The Mr. Austin who signs the letter and who arranged the employment of the plaintiff testified that he is a citizen of the United States. The letter does not disclose that the steamer did not belong to the American corporation or that she had a British registry, or that the proposed purchasers of the ship would have to be approved by the British authorities, or that the American corporation was acting for, or on behalf of, the Canadian corporation which owned the ship. The record does not disclose that the plaintiff's attention was called in any way to these facts at the time he was employed or that he knew anything about them until after the contract of sale had been signed by the defendant and by the purchasers brought into the transaction by the broker. We do not know any rule of law which enables this court to go outside the record and infer that the plaintiff must have known that the ship he was employed to sell was a British ship. But we shall for the sake of the argument assume, what no doubt was true in fact, that the plaintiff knew all the time that the ship was British and that the seller and purchasers were British. We know of no rule of law, however, which imposed upon the plaintiff under such circumstances the duty of acquainting himself with the British law, and any Rules or Regulations which the British Government had established concerning the transfer of British ships during the war. What a broker
167 undertakes *it* merely to produce a person able, ready and willing to purchase on the terms prescribed by his principal. If there are other conditions to be complied with it is the duty of the

principal to acquaint the broker with them. The principal is not relieved from the duty of disclosure by the fact that the conditions happen to grow out of the peculiarities of the foreign law. It is the foreign principal and not his American broker who is assumed to know what the foreign law is.

It appears too that the defendant had entered into a bunker coal agreement with the British Government by which it agreed to comply with certain instructions and rules of the Government in the operation of its vessels and agreed that it would never charter any vessel to anyone to whom the British Government objected. The answer to the complaint alleges referring to the above agreement that "This fact was or should have been known by the plaintiff." It could not have been known to him, however, unless Gaston, Williams & Wigmore or the defendant or the British authorities disclosed it. The evidence does not show that the information was communicated to the plaintiff, and the plaintiff himself testified that he had "no knowledge of the bunker agreement" by which we understand him to mean that he had no knowledge of it until after the con-
168 tract of sale was executed by the vendor and vendees. If a principal enters into an agreement which restricts his right to sell it is — duty to disclose it to his broker. And if he makes no such disclosure and the broker has no knowledge of it the broker certainly cannot be deprived of his commission because the principal fails to complete the sale on that account.

The fact of the matter is that it never occurred to the principal at the time he employed his broker, the plaintiff, nor for that matter until after the contract of sale was signed by it and the purchasers, that there might be an obstacle to the final consummation of the sale by the refusal of the British authorities to approve it. The fault was that of the seller and not that of the broker. The broker performed all that he was required to do by the terms of his employment and the seller cannot be heard now to defeat his right to his commission by setting up its own failure to make the disclosure as a bar to his recovery.

The broker produced two purchasers and one only was objected to, and the one who was objected to assigned all his interest in the contract of sale to the other who was able, ready and willing to perform. Notwithstanding the assignment the vendor refused to proceed with the sale under the contract which it had executed. With its reasons for doing so we are not now concerned. Mr. Austin, the general manager, of Gaston, Williams, & Wigmore testified that at that time the price of vessels was rising and that his
169 concern was getting offers for the ship "right along." In reference to one of the offers he was questioned and answered as follows:

"Q. Was it as high as $575,000?
A. I can tell from my papers; somewhere around that."

It does not appear whether or not that fact influenced the defendant's conduct.

It may be proper for us to say more explicitly, although it might be inferred from what has been already stated, that if it be assumed that the broker was impliedly bound under his contract of employment to produce as purchasers of the ship persons under no legal disability which precluded them from entering into a binding contract of sale that the question as to whether such persons were produced depends upon the lex loci contractus, using the phrase as denoting the place where the contract was entered into. It may be conceded that where a contract is by its terms to be performed in a place other than that in which it is made the parties according to the trend of American authorities are presumed to adopt the law of the place of performance as the law of the contract. Hall v. Cordell 142 U. S. 116. The general rule as to contracts, however, is that they are to be governed as to their validity as well as to their nature and interpretation by the law of the place where they are made unless the contracting parties clearly appear to have had some other law in view.

And under the express terms of the executed contract of sale
170 between the vendor and the vendees the ship was to be delivered at New York. It certainly cannot be said that it was made known to the broker at the time of his employment that any other law than the law of the place of contract was in any way applicable to the transaction in which the parties were engaged. By the lex loci contractus the vendees were not subject to any legal disability and were able, ready and willing to consummate the transaction.

It is elementary that a broker employed to find a purchaser is not entitled to a commission where no sale is made unless he has at least produced one who is able, ready and willing to take the property on the terms specified. Ferguson v. Willard 196 Fed. 370; Wittwer v. Hurwitz 216 N. Y. 259; Wheeler v. Lawler 222 Mass. 210; Abbott v. Lee 86 Conn. 392. Each of the words able, ready and willing expresses an idea that the others do not convey. Phillips v. Rudy, 146 Ky. 780, 784. And all three of these elements must be found in the purchaser who is produced to entitle the broker to his commissions. Bronk v. Connecticut Trust &c. Company, 89 Conn. 134; Riley v. Hoffman 216 Mass. 352; Von Bayer v. Minigret Mills Co. 164 App. Div. (N. Y.) 698; McDermott v. Mahoney 129 Iowa 292.

The general rule appears to be that the broker is entitled to his commission when his efforts have resulted in a sale, or in procuring a customer who is able, ready and willing to buy upon the terms
prescribed by the owner. If the customer is produced who
171 is able, ready and willing to buy the fact that the sale fails through no fault of the broker and no fault of customer cannot deprive the broker of his commission. Home Banking & Realty Co. v. Baum 85 Conn. 383, 386; Smith v. Peyrot 201 N. Y. 210, 214.

Where a contract is one not to be performed elsewhere the customer produced should be by the lex loci contractus, legally able to enter into the contract. In Volker v. Fish 75 N. J. Eq., 497, the owner of certain real estate agreed with a broker to sell the same for $5,700 or any greater sum and said that she should retain for her own use all purchase money in excess of that sum. The broker procured

me to purchase the premises for $6,000. Later the purchaser who was an infant at the time the property was purchased repudi-
172 ated the purchase and recovered back the purchase price. The court held that the broker never earned the commission as it was paid on a sale which was afterwards avoided, and that the commission which had been paid could not be retained by the broker. The Vice-Chancellor said: "An invalid sale is practically no sale, * * * and she (the broker) cannot retain an advantage resulting from her unavailing effort." In Fox v. Ryan 240 Ill. 391, 397, the court declares that when a broker produces a buyer and the seller accepts him and executes an enforecable contract of sale, it is held to be a determination by him of the purchaser's ability to perform his contract and the seller cannot defeat the broker's commissions on the ground that the purchaser is not able to buy the property. And see Wilson v. Mason 158 Ill. 304, 311. And in Mitchell v. Weddington, decided by the Kentucky Court of Appeals, 122 S. W. 802, (1909)[1] the broker was employed to purchase the coal and minerals on a certain farm. He obtained from the owners of the farm a contract signed by each of the six owners in ehich they declared that they had sold to the defendant all the coal and minerals in, on, and under their lands at the agreed price. It appeared that one of the owners who signed the contract was a minor. The defendant, the vendee, refused to complete the purchase.
173 The broker brought suit against him for his commissions. The court below instructed the jury to find for defendant. The Court of Appeals affirmed the judgment saying: "The cases cited by appellant are not applicable to the facts of this case. In those cases the brokers had done all that they contracted to do. Here the appellant did not do all that he contracted to do, because he failed to purchase the land by a contract that was binding on all the parties signing it." The general rule in England and the United States rejects the continental rule and holds that the capacity of a party to contract is determined by the law of the place where the contract is made. In the above case by the lex loci contractus the contract was not binding because of the infant's right to disaffirm.

In Goodnough v. Kinney 205 Mass. 203 it is said: "It is settled, that where the broker secures a customer who is both willing and financially able to purchase property upon the terms authorized by the principal, who has been informed of the completion of the negotiations, a commission has been earned, even if a sale is not completed because the parties never enter into a binding agreement or the owner refuses or neglects to make a conveyance."

In Kalley v. Baker 132 N. Y. 1 a broker was employed by the defendant to effect a sale of his farm. The broker produced
174 a customer and negotiations began which resulted in an agreement for an exchange of the farm for an apartment house owned by the customer the broker produced. The written contract provided that the two properties were to be free from all incumbrances except the apartment house was to be subject to two

[1] The case is not in the Kentucky Reports.

mortgages. When it came to the exchange of deeds the person who employed the broker found objections to the title offered by the customer. A considerable sum of interest on the mortgages was unpaid as well as a large amount of unpaid taxes, and the customer was a married woman and her husband had not joined in the deed. There were other objections and the title was rejected and the contract of exchange was never performed. The court held that the broker was entitled to his commissions when the contract of exchange was executed. The court below instructed the jury "that in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts, when he (the broker) brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him." The court held that the instruction presented no error.

In Colvin v. Post Mortgage & Land Co. 225 N. Y. 510, 516, it is laid down that to earn his commissions a broker ordinarily must accomplish what he undertakes to do in his contract of employ-
175 ment. That if he fails to do so but produces a buyer with whom the owner is satisfied and who executes a contract of sale with the owner at a price and upon terms satisfactory to the latter, the broker is entitled to his compensation. The court then goes on to say that a failure to complete thereafter, whether due to the fault of the buyer or of the seller, will not deprive the broker of his commissions. This seems to be the law of the State of New York which is the place in which the broker was employed and where the services were rendered. And in the instant case the broker produced customers who were able, ready and willing to contract and were accepted by the seller who executed a contract of sale with them.

That the broker may lose his right to his commission because of the illegality of the transaction is of course true. The rule is that if the transaction negotiated by the broker is illegal and he participates in the illegality or has knowledge thereof he is not entitled to his commission. Neither is he entitled to it if his services are tainted with illegality. 9 C. J. 634; 19 Cyc. 273; Irwin v. Williar 110 U. S. 499, 510; Volker v. Fisk, supra; Walsh v. Hastings, 20 Col. 243; Kahn v. Walton, 46 Ohio St. 195. But in this case the contract of sale was not illegal under the law of the State of New York where it was made and was to be performed.

The Supreme Court has held that if the party employing a broker makes representations to the latter who obtains a customer
176 able, willing and ready to buy the vendor is bound for the commission if the sale fails solely because the vendee finds that the representations made by the vendor to the broker and repeated by him to the vendee were false. In Dotson v. Milliken 209 U. S. 237 the owner of 124,000 acres of coal land agreed with a broker to give him $2.50 an acre for every acre the broker could sell at $20, and that the broker was to go to work for a purchaser. The owner made certain representations to the broker as to the intentions of a railroad company to run its road through the property. The broker secured a purchaser on the terms named by the vendor but when it

came to consummating the deal the purchaser declined to take the property because he learned that the representations as to what the railroads would do were not true. The broker sued for his commission and obtained a judgment in his favor which the Supreme Court affirmed. The court in a unanimous opinion written by Mr. Justice Holmes said "We must repeat that it does not matter how much or how little the purchaser relied upon the defendant's representations if plaintiff relied upon them and obtained a purchaser ready and able to purchase upon the basis that the defendant's representations to the plaintiff were true." In the above case the thing contemplated was a sale and no sale resulted but the broker got his commission.

177 In principle we are unable to distinguish such a case as the above from one in which the vendor withholds from the broker essential conditions as that the buyer must be approved by a foreign government, and the buyer produced is able, willing and ready to perform but the sale fails solely because of some condition undisclosed to the broker.

To recapitulate in brief the broker in this case produced purchasers able, ready and willing to buy and not disqualified from doing so by the lex loci contractus. They were accepted by the defendant who signed by them a valid contract of sale. While the purchasers were British subjects and could not obtain British registry for the ship that fact would not invalidate the sale nor prevent title from passing, and they were willing to take the title at their own risk with full knowledge of all the facts. The principal alone refused to consummate the transaction for reasons personal to himself and not disclosed to the plaintiff. The failure to complete was not the fault of the plaintiff who is entitled to recover his commissions.

Judgment Affirmed.

178 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Gaston et al. v. Warner. (Copy.) Opinion. Rogers, Circuit Judge.

179 United States Circuit Court of Appeals for the Second Circuit.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Plaintiff-in-Error (Defendant Below).

against

PHILIP A. WARNER, Defendant-in-Error (Plaintiff Below).

HOUGH, *C. J.* (dissenting):

This broker produced purchasers who were ready, willing and able enough, to do everything needful except satisfy British law in the sale of a British vessel.

The arrangement for which this Court rewards plaintiff below, would have subjected the purchasers to penalties if not to criminal prosecution, made the ship something that had better be kept hidden

from the maritime power of Great Britain, and rendered it practically impossible for vendors to stay in the shipping business.

To produce such an imbroglio is not a service, and to call it a sale is a misnomer. What seems to me error arises from totally disregarding the law of the ship's flag.

I dissent.

180 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Gaston, Williams & Wigmore of Canada, Ltd., vs. Philip A. Warner. Dissenting Opinion. Hough, Circuit Judge.

181 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 14th day of March, One Thousand Nine Hundred and Twenty One.

Present:

Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Circuit Judges.

GASTON, WILLIAMS & WIGMORE, OF CANADA, LTD., Plaintiff in Error,

v.

PHILIP A. WARNER, Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

H. G. W.

H. W. R.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

182 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Gaston, Williams & Wigmore v. P. A. Warner. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 14, 1921. William Parkin, Clerk.

183 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 182 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Gaston, Williams & Wigmore, of Canada, against Philip A. Warner, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-one and of the Independence of the said United States the One Hundred and Forty-fifth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

184 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Gaston, Williams & Wigmore, of Canada, Limited, is plaintiff in error, and Philip A. Warner is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command
185 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the ninth day of May, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28197. Supreme Court of the United States, No. 840, October Term, 1920. Gaston, Williams & Wigmore, of Canada, Limited, vs. Philip A. Warner. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 12, 1921. William Parkin, Clerk.

186 United States Circuit Court of Appeals for the Second Circuit.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., *Plaintiff-in-Error*,

against

PHILIP A. WARNER, *Defendant-in-Error*.

It is hereby stipulated and consented that the certified transcript of record now on file in the office of the Clerk of the Supreme Court of the United States shall be taken as the return of the Clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari herein.

Dated, New York City, May 20, 1921.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Plaintiff-in-Error.

JOSEPH P. NOLAN,
Attorney for Defendant-in-Error.

187 [Endorsed:] United States Circuit Court. Gaston, Williams & Wigmore of Canada, Ltd., vs. P. A. Warner. Stipulation. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for plaintiff-in-error, 27 William Street, New York, N. Y.

188 To the Honorable the Supreme Court of the United States. Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York May 25, 1921.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

189 [Endorsed:] 560—28197. United States Circuit Court of Appeals, Second Circuit. Gaston, Williams & Wigmore v. P. A. Warner. Return to Certiorari. Office of the Clerk, Supreme Court U. S. Received Jun. 1, 1921.

190 [Endorsed:] File No. 28197. Supreme Court U. S., October Term, 1920. Term No. 280. Gaston, Williams & Wigmore, of Canada, Ltd., Petitioner, vs. Philip A. Warner. Writ of certiorari and return. File June 1, 1921.

SUPREME COURT OF THE UNITED STATES 1

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD.,
Petitioner,
(Defendant below)
against
PHILIP A. WARNER,
Respondent,
(Plaintiff below).

October Term, 1920.
No.

2

Sirs:

PLEASE TAKE NOTICE that the annexed petition for a *writ* of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit will be submitted to the Supreme Court of the United States at the opening of Court on the 11th day of April, 1921, or as soon thereafter as counsel can be heard.

Dated, New York, March 21, 1921.

Yours, etc.,
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for petitioner,
27 William Street,
New York City.

3

To:
JOSEPH P. NOLAN, ESQ.,
Attorney for Respondent,
25 Broad Street,
New York City.

4

SUPREME COURT OF THE UNITED STATES

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., Petitioner, (Defendant below) *against* PHILIP A. WARNER, Respondent, (Plaintiff below).	OCTOBER TERM—1920 No.

5

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of GASTON, WILLIAMS & WIGMORE OF CANADA, LTD., in the above-entitled cause, respectfully shows

6 to this Court as follows:

1. This is a petition for a *writ* of *certiorari* to review the decision of the Circuit Court of Appeals for the Second Circuit, affirming on a writ of error the judgment of the District Court of the United States for the Southern District of New York, in an action at law.

2. Your petitioner at all the times herein mentioned was a corporation organized and existing under and pur-

suant to the laws of the Dominion of Canada, and was defendant in the court below.* The respondent, Philip A. Warner, plaintiff in the court below, was, at said times, a resident of the City, County and State of New York.* 7

3. The case has been twice tried in the District Court of the Southern District of New York and has twice been before the Circuit Court of Appeals for the Second Circuit. The first trial resulted in a judgment in favor of the defendant, entered on an order of the Trial Judge, dismissing the complaint at the end of the plaintiff's case.

This judgment was reversed by the Circuit Court of Appeals for the Second Circuit, 261 Fed. 993. 8

The second trial, on which certain facts were developed by the defendant which had not been brought out on first trial because the complaint was dismissed at the end of the plaintiff's case, resulted in a judgment for the plaintiff.

This judgment was affirmed by the Circuit Court of Appeals, with Hough, C. J. dissenting. Of the five judges who have heard the case, therefore, three had been for the plaintiff and two for the defendant.

9

The Questions Involved.

4. The case presents a question of international importance, which is inseparably bound up with the commerce and intercourse of the United States with other nations. The majority decision of the Circuit Court of Appeals, which the defendant seeks a writ to review, flatly held that an alleged contract for the purchase of a

* For clarity the parties hereto are referred to as they were in the District Court.

10 British ship, flying the British flag, signed in New York during the late war, between British subjects, which agreement was absolutely void and unenforcible under British law, and forbidden by it under severe penalties, was a valid and binding contract, and that a broker, an American citizen, who persuaded British subjects to sign the alleged contract, was entitled to a broker's commission for so doing, in an amount approximating, with interest, $15,000.

In other words the decision of the Court below is that two British subjects in New York can make a valid con-
11 tract to buy and sell a British ship although their doing so constitutes a crime against their own government.

FACTS.

5. The facts in the case are not in dispute and are substantially as stated in the majority opinion of the Court below.

They are as follows:

On December 11, 1916, the defendant, a Canadian
12 Corporation, employed the plaintiff as a broker to procure a purchaser for the British steamship *Eskasoni*, for the sum of $475,000. The plaintiff knew that a British steamer was involved when he was engaged, *Warner*, fols. 102, 116, and recognized that there were limitations on the sort of people he was entitled to produce as prospective purchasers. *Warner*, fol. 116.* His employment was evidenced by the following letter, *Plaintiff's Ex. 1*,

* Please compare the plaintiff's testimony, fols. 102, 114, 116, with the statement in the opinion of the Court below that the record does not disclose that Mr. Warner knew a British ship was involved.

Record, p. 109, supplemented by testimony that the plaintiff's commission was to be 2½% in the event of success: 13

"December 11, 1916.

Mr. P. A. Warner,
30 Church Street,
New York, N. Y.

Dear Sir:

Referring to our conversation this afternoon, I beg to advise that you are authorized to offer the steamer *Eskasoni*, for sale for $475,000. Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers. 14

Very truly yours,
J. B. Austin, Jr.
Vice President and General Manager."

Thereafter the plaintiff produced Philip Templeman and George A. Moulton, British subjects, who entered into what purported to be a contract with the defendant to purchase the British steamer *Eskasoni* for $475,000. *Plaintiff's Ex. 2,* Record, p. 110.

Templeman and Moulton paid $5,000 down on the execution of the alleged contract and the petitioner paid 15
the plaintiff a commission of 2½% thereon, amounting to $125. *Warner,* fol. 99.

Neither Templeman nor Moulton ever obtained any license or permit from the British authorities to charter or purchase the vessel as required by British law. This is the concurrent finding of both courts. If the alleged contract was invalid as contended by defendant, its later assignment was immaterial.

16 The British Defense of the Realm Regulations were put in evidence at the trial, and were admitted to be in force at the time the alleged contract for the purchase and sale of the vessel was entered into between the defendant and Templeman and Moulton. These regulations had the force of law. *Conway,* British Barrister, fols. 183-185.

Section 39 CC of the British Defense of the Realm Regulations reads as follows:

17 "39 CC. A person shall not, without permission in writing from the Shipping Comptroller, directly or indirectly and whether on his own behalf or on behalf of or in conjunction with any other person, purchase or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel.

"If any person acts in contravention of this regulation or if when any permission of the Shipping Comptroller has been granted under this regulation, subject to any conditions and the person to whom it was granted fails to comply with any
18 such condition, he shall be guilty of an offense against these regulations."

Mr. Conway, a British Barrister, called by the defendant as an expert witness to prove the British law, testified that the alleged agreement entered into between the defendant and Moulton and Templeman, was absolutely illegal and unenforcible and against the public policy of England. Fol. 193.

Mr. Conway testified that the Defense of the Realm 19
Regulations did not merely impose a penalty for negotiating the sale or attempting to make the sale but made any negotiations or attempted sales void and unenforcible, and that no civil rights could spring from any attempted contract entered into without first obtaining the permission of the Shipping Comptroller, Fols. 194, 195. Both Courts have found this consent was never obtained.

Mr. Conway testified, fol. 195, that under British law *"there was not any contract."* He cited as an authority *Anglo-Russian Merchant Traders* v. *Batt Co.*, 1917, 2 20
Kings Bench, 679.

Mr. Conway also testified that the ship, being a British ship, there was not any possibility of transferring her to Templeman and Moulton. Fol. 200.

Subsequent to the execution of the alleged contract for the sale of the steamer to Templeman and Moulton, the defendant approached the British authorities at New York on the subject of the sale and was notified that consent to the sale would not be given. *Austin*, fols. 131-2, 21
Richardson, British Vice Consul, fol. 173. The inability of Templeman and Moulton to obtain the required consent of the British Government to become purchasers of the steamer having been disclosed, the deal was called off for this reason. The defendant returned the $5,000. to Templeman and Moulton paid by them to bind the contract. *Austin*, fol. 137. The refund was accepted.

At the conclusion of the second trial in the District Court, the Trial Judge instructed the jury that as a mat-

22 ter of law the existence of British law making the negotiations and alleged contract for the sale of the steamer illegal and void, was not any defense to the action, and directed them to bring in a verdict for the plaintiff for the sum of $11,750. with interest thereon from March 12, 1917, fol. 320, to which charge the defendant duly excepted and has assigned error. Fols. 428, 429.

Thereupon the defendant, fol. 321, asked the court to charge the jury, "that if they believed the evidence to the effect that the contract under British law was illegal and void, that that would constitute a good defense to
23 this action." The Court declined to make this charge, to which the defendant duly excepted, fol. 321, and has assigned error, fols. 429, 430.

The jury, as directed by the Trial Judge, brought in a verdict in favor of the plaintiff for the sum of $11,750. fol. 322. The defendant duly moved to set aside this verdict on the ground that it was contrary to law and the evidence and on all the other grounds stated in section 999 of the New York Code of Civil Procedure, except that it was inadequate. Fol. 322. This request was denied, to which the defendant duly excepted, fol. 323, and
24 has assigned error, fol. 421.

In the Court below the defendant contended that the Trial Judge erred

1. In instructing the jury that the existence of British law was not a defense to the action and directing them to bring in a verdict for the plaintiff for the full amount claimed, *Assignment of Errors*, No. 13, *Record*, p. 142, and

2. In declining to charge the jury as requested by the defendant that "if they believed the evidence to the effect that the contract under British law was illegal and void, that that would constitute a good defense to this action." *Assignment of Errors,* No. 14, *Record,* p. 143. 25

It was conclusively established that under British law the negotiations and alleged contract for the sale of the British ship *Eskasoni* were absolutely illegal and void, and in fact that no contract was made; that when the British authorities were asked to consent, they refused to do so and thereupon, because of Templeman and Moulton's inability to obtain the required permission to purchase, the matter had to be called off. 26

REASONS FOR GRANTING A WRIT.

6. The majority opinion of the Circuit Court of Appeals (Judges Rogers and Ward) summarizes the decision as follows:

> "To recapitulate in brief, the broker in this case produced purchasers able, ready and willing to buy and not disqualified from doing so by the *lex loci contractus.* They were accepted by the defendant *who signed with them a valid contract of sale.** While the purchasers were British subjects and could not obtain British registry for the ship, that fact would not invalidate the sale nor prevent title from passing, and they were willing to take the title at their own risk with full knowledge of all the facts. The principal alone refused to consummate the transaction for reasons per- 27

* Italics ours.

28 sonal to himself and not disclosed to the plaintiff. The failure to complete was not the fault of the plaintiff who is entitled to recover his commissions."

If the above statement correctly represents the law, neither the United States Government, nor any government in the world has any control over the transfer and sale of its vessels if made abroad, and the *United States Merchant Marine Act of 1920,* which prescribes the conditions under which United States Merchant vessels shall be transferred, is a nullity beyond our shores.

29 In a dissenting opinion, Judge Hough said:

> "This broker produced purchasers who were ready, willing and able enough to do everything needful *except satisfy British law in the sale of a British vessel.**
>
> "The arrangement for which this Court rewards plaintiff below, would have subjected the purchasers to penalties if not to criminal prosecution, made the ship something that had better be kept hidden from the maritime power of Great Britain and rendered it practically impossible for
30 vendors to stay in the shipping business.
>
> "To produce such an imbroglio is not a service, and to call it a sale is a misnomer. What seems to me error arises from totally disregarding the law of the ship's flag."

The decision of the majority of the Court below finds no welcome in the commercial requirements of the day where ships are recognized as national as well as pri-

* Italics ours.

vate instruments. In the light of common knowledge 31
ships cannot be regarded as mere chattels because in addition to being so much steel and iron they have a national character. Ships are today recognized as part of the territory of the country whose flag they fly, carriers to a large extent of their nation's laws as well as goods.

The Scotia, 14 Wall. 170, 184.
Crapo v. *Kelly*, 16 Wall. 610, 624.
Wilson v. *McNamee*, 102 U. S. 572.
The Hamilton, 207 U. S. 398.
The International Navigation Co. v. *Lindstrom*, 32
C. C. A. 2nd Cir. 123 Fed. 475.
The Eaglepoint, C. C. A. 3rd Cir. 142 Fed. 453.

The rationale of the decision of the majority of the court below is based on the narrow ground that a ship is a mere chattel, just so much steel and iron. It completely disassociates ships from their national character without which no ship can sail the seas. Without the visé of the British authorities British ships could not even clear from an American port.

The decision is contrary to the Circuit Court of Ap- 33
peals own finding in *Keeveney* v. *Charles R. McCormack*, 266 Fed. 319, the only difference being that in the *Keeveney* case an American vessel was involved and the broker was held not to be entitled to a commission because the contract for the sale was void and unenforcible under the laws of the United States. If the *Keeveney* case had arisen in England, the decision of the majority of the Court below would be an authority for holding

that the broker in that case would have been entitled to a commission.

7. This was a commercial transaction and should be dealt with as such. Viewed as a business matter, it is clear that what the defendant engaged the plaintiff to do was to procure a purchaser who was qualified to buy the steamer. It is perfectly apparent from the record that Moulton and Templeman, the alleged purchasers, were neither able to buy nor able to enter into a binding contract to buy the steamer, and that the sale failed because of disabilities in the very persons produced by the plaintiff.

It is preposterous to say that a document signed between British subjects for the sale of a British ship depends for validity on the law of the place where the contract is made, when the law at the place where the ship is registered is the only law which can pass a good title to the ship as a commercial instrumentality.

8. The plaintiff's whole case is based upon the theory that he produced purchasers for the steamer who made a valid contract to buy. The plaintiff himself has so testified. *Warner*, fol. 119. The case therefore turns on the question of whether the document (*Plaintiff's Exhibit 2*, Record, p. 110) by which two British subjects sought to purchase a British steamer from another British subject, which document was void and unenforcible under British law, was a valid and binding contract.

The decision of the majority of the Court below holds that the document signed by Templeman and Moulton and the defendant was a valid contract notwithstanding

British law. This was a necessary finding in order to entitle the plaintiff to recover. 37

Volker v. *Fish*, 75 N. J. Equity, 497,

and the cases cited therein.

Goodnough v. *Kinney*, 205 Mass. 203.

9. It is submitted that the question involved in the present controversy is one of the very greatest importance to the world of commerce and trade because all nations have now placed restrictions on the transfer of ships. If the decision stands that British ships, flying the British flag, can be disposed of in America, without regard to British law, then certainly American ships can be disposed of in England without regard to American law which forbids sales of American ships except as prescribed by the Merchant Marine Act of 1920. 38

In finding that the alleged contract was to be determined by American law, the defendant confidently asserts error was committed. In this connection the decision of *Keeveney* v. *Charles R. McCormack*, 266 Fed. 314, is interesting because of the grounds on which the same Court relied in distinguishing this case when it was first before that Court in 261 Fed. 993. None of the grounds on which the Court relied for distinction in the *Keeveney* case, 266 Fed. 314, exist in the present record. 39

It is equally clear that neither Great Britain nor the United States would recognize sales of their ships, carrying their flags, made contrary to their respective laws and that if attempts are made to do so, seizures and other serious consequences will follow.

10. The defendant therefore avers that these questions are sufficient to justify the exercise by this court of the jurisdiction vested in it to issue a *writ of certiorari* requiring causes to be brought here for review from the Circuit Court of Appeals.

11. The defendant presents herewith a certified copy of the transcript of record of all the proceedings in the District Court and in the Circuit Court of Appeals herein.

WHEREFORE your petitioner respectfully prays that a *writ* of *certiorari* may be issued out of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding the said Court to certify and send to the Supreme Court for its review and determination on a day certain to be therein designated and file a complete transcript of the record of all proceedings in the said Circuit Court of Appeals in the said case entitled "Gaston, Williams & Wigmore of Canada, Ltd., plaintiff-in-error, defendant below, against Philip A. Warner, defendant-in-error, plaintiff below" pursuant to Sec. 240 of the Judicial Code, and that the said decree of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court and that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem meet and in conformity with the said act.

Your petitioner will ever pray, etc. 43

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD.
By R. H. LEE MARTIN,
Secretary.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Petitioner,
27 William Street,
New York City.

STATE OF NEW YORK,
County of New York, } ss.: 44

R. H. LEE MARTIN, being duly sworn, says:

I am Secretary of Gaston, Williams & Wigmore of Canada, Limited, the petitioner herein.

I have read the foregoing petition and know the contents thereof and the same is true of my own knowledge.

The reason this verification is not made by the petitioner is that it is a foreign corporation.

R. H. LEE MARTIN.

Sworn to before me this
21st day of March, 1921. 45
WM. O. GODDARD,
Notary Public, Kings County
Certificate filed in New York County

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

CLETUS KEATING,
Counsel.

Supreme Court of the United States.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD.,
Petitioner,
(Defendant below)

against

PHILIP A. WARNER,
Respondent,
(Plaintiff below)

October Term 1920, No.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

For convenient reference the parties to this litigation will be referred to as plaintiff and defendant, as they were first named in the District Court.

The contract sued upon by the plaintiff was made in the State of New York between an American citizen, and the defendant, a British subject. It was an ordinary contract of employment such as is usually made between principals and their brokers. (Plaintiff's Exhibit 1, p. 109, fol. 325).

This contract is dated December 11th, 1916. The plaintiff produced two individuals, British subjects, and a contract for the sale of the SS. "Eskasoni" was entered into. (Plaintiff's Ex-

hibit 2, p. 110, fol. 328). Although this contract is dated December 12th, 1916, the testimony in the record is that the contract was signed on March 11th, 1917. (Record, p. 31, fol. 93). There were many changes in the contract before it was signed. (Record, p. 40, fol. 118). It was changed about a "dozen or fifteen times before it was signed". (Record, p. 38, fol. 113).

After three months of consideration and rewriting of the proposed contract of purchase and sale the defendants, who were British subjects, entered into a contract for the sale of the SS. "Eskasoni" and did not in said contract insert any clauses referring to the British Law, which they, as British subjects, were presumed to know. Certainly the plaintiff, an American citizen, cannot be charged with knowledge of the law of a foreign jurisdiction.

In addition to the statement of facts set forth in the petition for the writ, we beg to call the Court's attention to the fact that this case was first tried before District Judge Sheppard, and a jury, and the plaintiff's complaint was dismissed. The case was appealed to the Circuit Court of Appeals and that Court, by the unanimous decision of Circuit Judges Ward, Hough and Manton, reversed the judgment of the court below and ordered a new trial. The case was tried a second time before John C. Knox, District Judge, and resulted in a verdict for the plaintiff. On appeal to the Circuit Court of Appeals, Judges Ward, Rogers and Hough sitting, the judgment was affirmed by Judges Ward and Rogers, Judge Hough writing a dissenting opinion.

So that, of the seven Judges who have heard this case, Judge Sheppard was in favor of the de-

fendant, and Judge Hough on the second appeal wrote a dissenting opinion, and five Judges out of seven have sustained the plaintiff's contention.

The defendant, in the courts below, and in its petition for this writ, confuses the issue. The defendant constantly raises the question of the validity of the contract of sale for the SS. "Eskasoni" (Plaintiff's Exhibit 2, p. 110, fol. 328), and seems to overlook the fact that this action was brought to recover for services under a contract of employment, (Plaintiff's Exhibit 1, p. 109, fol. 325), made in the State of New York.

ARGUMENT.

I.

The contract employing the plaintiff to sell the SS. "Eskasoni" was made at the City of New York, and he, having performed all that was required of him, and a contract having been entered into between his principal and his proposed buyers, he became immediately on the signing of the contract, entitled to his commission.

Kally *v.* Baker, 132 N. Y. p. 1.
Bunnell *v.* Chapman, 173 A. D., p. 108 at p. 109.
Colvin *v.* Post Mortgage & Land Co., 225 N. Y., p. 510, at p. 516.
Callister *v.* Wichern, 147 A. D., 14.
Fleet *v.* Barker, 120 A. D., 455.
Brady *v.* Foster, 72 A. D., 416.
Slocum *v.* Ostrander, 141 A. D., 380. Affd. 205 N. Y., 617.

Alt *v.* Doscher, 102 A. D., 344. Affd. on opinion below, 186 N. Y., 566.
Halprin *v.* Schachne, 27 Misc., 195 at p. 198.

II.

The contract of employment, having been made in the State of New York, and the delivery of the ship having been agreed to be made in the State of New York, the law of the State of New York, as to the validity, interpretation and construction of the contract, applies.

Hall *v.* Cordell, 142 U. S., 116, at p. 120.

III.

The terms of the contract of employment (Plaintiff's Exhibit 1, Record p. 109, fol. 325), that the "details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers", fixed the responsibility of the plaintiff and his right to his commissions, because, as was testified, after the plaintiff produced his purchasers the contract was written in the office of the defendant (Record p. 31, fol. 93). It was re-written some dozen or fifteen times (Record p. 38, fol. 113), and then it was signed and the first payment made under it.

Under the authorities cited in Point 1, supra, the sellers then accepted the purchasers and the broker became entitled to his commission.

> "Plaintiff had performed the service for which he was employed, and after his work had been done, the defendants could not relieve themselves of the obligation to pay his

earned compensation by exacting further concessions".

Halprin *v.* Schachne, 27 Misc., 195 at p. 198, and cases cited under Point I.

IV.

The British Defense of the Realm Act could not, under any circumstances, apply in the jurisdiction of the United States Courts, or of any of the State Courts, since it was a statute penal in its nature. The witness Conway testified that there was a very strong penalty provided in the regulations (Record p. 65, fol. 194). The citations given by Mr. Conway, and referred to in the petition for this writ, have no application to the sections of the Defense of the Realm regulations relied upon by the defendant.

Judge Hough, in his dissenting opinion, calls attention to the fact that this statute subjected the purchasers to penalties.

We submit that the Defense of the Realm regulations are penal in their nature, and, being so, they cannot be invoked by the defendant to aid it in the United States Courts.

Huntington *v.* Attral, 146 U. S., 657, at pp. 665, 668.

Flash *v.* Conn, 109 U. S., 371 at pp. 376, 377.

Wisconsin *v.* Pelican Ins. Co., 127 U. S., p. 265 at p. 290.

Northern Pacific Ry. Co. *v.* Babcock, 154 U. S., 190 at p. 198.

Texas & Pacific Ry. Co. *v.* Cox, 145 U. S. p. 593, at p. 604.

Brady *v.* Daly, 175 U. S., p. 148 at p. 155.

V.

Even if the contract of employment for the sale of the "Eskasoni" (as distinguished from the contract of employment of the plaintiff) was illegal, if the plaintiff did not know of the illegality, or did not contribute to it, he would not be deprived of the right to his commission.

> "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances."
>
> Irwin *v.* Williar, 110 U. S., p. 499, at p. 510.

The plaintiff's contract of employment (Exhibit 1, p. 109, fol. 325) was legal.

The plaintiff testified that he did not know of the illegality of the contract for the sale of the "Eskasoni."

Record p. 39, fol. 115.
p. 41, fol. 122.
p. 42, fol. 124.

The presumption is always in favor of the parties intending to do a legal act, and not an illegal act.

Richards *v.* Wiener Co., 207 N. Y., p. 59.

> "The law will not presume, unless forced to do so, that a person intends to do an illegal act. It will not, therefore, presume that the

parties intended to make an illegal contract. The contract itself, therefore, was perfectly legal subject to certain limitations upon its enforcibility".

Richards *v.* Wiener Co., 207 N. Y., p. 59 at p. 65.

VI.

The case of Keveney *vs.* McCormick, (266 Fed. Rep., 316), has no application to the present case, because in the Keveney case both Keveney and the McCormick Company were American citizens, the ship was an American ship, the contract was made in America, and necessarily the American law was written into the contract of employment.

VII.

We respectfully submit that there is no serious or important question involved in this case, containing any novel or unusual feature requiring the decision of this Court.

This is a simple case of broker and principal, and, in these days of world trade, it contains no unusual feature because the contract of employment was between plaintiff, an American citizen, and defendant, a British subject. The contract of employment was made in the State of New York, and was valid where made.

VIII.

It is respectfully submitted that the writ should be denied.

JOSEPH P. NOLAN,
Attorney for Respondent,
(Plaintiff below)

JOSEPH P. NOLAN,
Counsel.

PETITIONER'S BRIEF

SYNOPSIS OF POINTS.

ALPHABETICAL ORDER OF CASES CITED IN BRIEF OF THE PETITIONER.

Supreme Court of the United States.

OCTOBER TERM—1921.

GASTON WILLIAMS & WIGMORE OF CANADA, LTD.,
Petitioner,

against

PHILIP A. WARNER,
Respondent.

No. 280

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE PETITIONER.

STATEMENT.

The plaintiff* brought this action at law to recover of the defendant,* a Canadian Corporation, commissions alleged to be due him as a broker for procuring purchasers for the British steamer *Eskasoni* at an agreed price of $475,000.

The case has been twice tried in the District Court for the Southern District of New York and has twice

* For convenience the parties hereto are referred to as they were in the District Court.

been before the Circuit Court of Appeals for the Second Circuit. On the first trial the District Judge directed a verdict for the defendant at the end of the plaintiff's case on the ground that the alleged purchasers procured by the plaintiff were not able to buy the steamer. This judgment was reversed by the Circuit Court for the Second Circuit, 261 Fed. 993. The second trial, on which certain facts were developed by the defendant which had not been brought out on the first trial because the complaint was dismissed at the end of the plaintiff's case, resulted in a judgment for the plaintiff. This judgment was affirmed by the Circuit Court of Appeals for the Second Circuit, 272 Fed. 56, with Hough, J. dissenting.

Facts.

On December 11, 1916, the defendant, a Canadian Corporation, at New York, employed the plaintiff, an American citizen, as a broker to procure a purchaser for the British steamship *Eskasoni* for the sum of $475,000. The plaintiff knew that a British steamer was involved when he was engaged, and recognized that there were limitations on the sort of people he was entitled to produce as prospective purchasers. *Warner*, fols. 34, 39.*

The employment was evidenced by the following letter, *Plaintiff's Exhibit 1*, record, p. 109, supplemented by testimony that the plaintiff's commission was to be 2½% in the event of success:

---

* Please compare the plaintiff's testimony, fols. 34, 38, and 39, with the statement in the opinion of the Court below that the Record does not disclose that Mr. Warner knew a British ship was involved.

"December 11, 1916.

"Mr. P. A. Warner,
30 Church Street,
New York, N. Y.

Dear Sir:

Referring to our conversation this afternoon I beg to advise that you are authorized to offer the steamer Eskasoni for sale for $475,000. Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers.

Very truly yours,

J. B. Austin, Jr.,
Vice President and General Manager."

Thereafter the plaintiff produced Philip Templeman and George A. Moulton, British subjects, who entered into what purported to be a contract with the defendant to purchase the British steamship *Eskasoni* for $475,000. *Plaintiff's Exhibit 2,* page 82.

Templeman and Moulton paid $5,000 down on the execution of the alleged contract and the defendant paid the plaintiff a commission of 2½% thereof, amounting to $125. *Warner,* fol. 33.

At the time the alleged contract was signed in New York, the *Eskasoni* was in Liverpool, England. *Austin,* fol. 51. The steamer never came to New York but went from Liverpool to Philadelphia. *Austin,* fol. 51.

Neither Templemen nor Moulton ever obtained any license or permit from the British authorities to charter or purchase the vessel as required by British law. This is the concurrent finding of both Courts.

If the alleged contract for the sale of the steamer was invalid as contended by the defendant, its later assignment as claimed by the plaintiff was immaterial.

The British Defense of the Realm Regulations were put in evidence at the trial and were admitted to be in force at the time the alleged contract for the purchase and sale of the vessel was entered into between the defendant and Templeman and Moulton. These regulations had the force of law. *Conway,* British Barrister, fols. 61, 62.

Section 39 CC of the British Defense of the Realm Regulations reads as follows:

> "39 CC. A person shall not, without permission in writing from the Shipping Comptroller, directly or indirectly and whether on his own behalf or on behalf of or in conjunction with any other person, purchase, or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel.
>
> "If any person acts in contravention of this regulation or if when any permission of the Shipping Comptroller has been granted under this regulation, subject to any conditions and the person to whom it was granted fails to comply with any such condition, he shall be guilty of an offense against these regulations."

Mr. Conway, a British barrister called by the defendant as an expert witness to prove the British Law, testified that the alleged agreement entered into between the defendant and Templeman and Moulton was absolutely void and unenforcible and against the public policy of England. *Fol.* 65.

Mr. Conway testified that the Defense of the Realm Regulations did not merely impose a penalty for negotiating the sale or attempting to make a sale, but made

any negotiations or attempted sales void and unenforcible and that no civil rights could spring from any attempted contract for the sale of the ship entered into without first obtaining permission of the Shipping Comptroller. *Fols.* 65, 66.

It is undisputed that this permission was never obtained by Templeman and Moulton.

Mr. Conway testified, *fol.* 65, that under the British law *"there was not any contract"* and cited as an authority *Anglo Russian Merchant Traders* vs. *Batt Co.*, 1917, 2 Kings Bench 679.

Mr. Conway also testified that the ship being a British ship there was not any possibility of transferring her to Templeman and Moulton. *Fol.* 67.

Subsequent to the execution of the alleged contract for the sale of the steamer to Templeman and Moulton, the defendant approached the British authorities at New York on the subject of the sale and was notified that consent of the British Government would not be given. *Austin, fols.* 44, 45, *Richardson,* British Vice Consul, *fol.* 58.

The inability of Templeman and Moulton to obtain the required consent of the British Government to become purchasers of the steamer having been disclosed, the transaction was called off for this reason. The defendant returned the $5,000 to Templeman and Moulton paid by them to bind the contract. *Austin, fol.* 46. The refund was accepted.

At the conclusion of the trial in the District Court, the Trial Judge instructed the jury that as a matter of law the existence of British law making the negotiations

and alleged contract for the sale of the steamer illegal and void, was not any defense to the action and directed them to bring in a verdict for the plaintiff for $11,750 with interest thereon from March 12, 1917. *Fol.* 107.

To this charge the defendant duly excepted and assigned error. *Fol.* 143.

Thereupon the defendant, *fol.* 107, asked the Court to charge the jury "that if they believed the evidence to the effect that the contract under British Law was illegal and void, that that would constitute a good defense to this action." The Court declined to make this charge, to which the defendant duly excepted, *fol.* 108 and assigned error, *fol.* 143.

The jury, as directed by the Trial Judge, brought in a verdict in favor of the plaintiff for $11,750. *Fol.* 108. The defendant duly moved to set aside this verdict on the ground that it was contrary to law and the evidence and on all the other grounds stated in section 999 of the New York Code of Civil Procedure except that it was inadequate. *Fol.* 108. This motion was denied, to which the defendant duly excepted, *fol.* 108 and assigned error, *fol.* 144.

On a Writ of Error to the Circuit Court of Appeals for the Second Circuit the defendant contended that the Trial Judge erred:

I. In instructing the jury that the existence of British Law was not a defense to the action and directing them to bring in a verdict for the plaintiff for the full amount claimed. *Assignment of Errors,* No. 13, *Record, p.* 71, and

II. In declining to charge the jury as requested by the defendant that "if they believed the evidence to the

effect that the contract under British law was illegal and void, that that would constitute a good defense to this action." *Assignment of Errors*, No. 14, p. 72.

The Circuit Court of Appeals in a majority decision (Judges Rogers and Ward) affirmed the judgment of the Court below. Judge Hough dissented.

The majority opinion of the Circuit Court of Appeals summarizes their decision as follows:

> "To recapitulate in brief, the broker in this case produced purchasers able, ready and willing to buy and not disqualified from doing so by the *lex loci contractus. They were accepted by the defendant who signed with them a valid contract of sale.** While the purchasers were British subjects and could not obtain British registry for the ship, that fact would not invalidate the sale nor prevent title from passing, and they were willing to take the title at their own risk with full knowledge of all the facts.
>
> "The principal alone refused to consummate the transaction for reasons personal to himself and not disclosed to the plaintiff. The failure to complete was not the fault of the plaintiff who is entitled to recover his commissions."

In a dissenting opinion Judge Hough said:

> "This broker produced purchasers who were ready, willing and able enough to do everything needful except satisfy British law in the sale of a British vessel."
>
> "The arrangement for which this court rewards plaintiff below, would have subjected the purchasers to penalties if not to criminal prosecution, made the ship something that had better be

* Italics ours.

kept hidden from the maritime power of Great Britain and rendered it practically impossible for vendors to stay in the shipping business.

"To produce such an imbroglio is not a service, and to call it a sale is a misnomer. What seems to me error arises from totally disregarding the law of the ship's flag."

Thereafter this writ of certiorari was granted on the application of the plaintiff.

The Questions Involved.

1. Is an agreement signed in New York between British subjects during the late War for the purchase of a British ship flying the British flag, located in Liverpool, England, which agreement was absolutely void and unenforcible under British law and forbidden by it under severe penalties, a valid and binding contract?

2. Is a shipbroker employed at New York by a British subject to find a purchaser for a British ship located at Liverpool, England, who produces two British citizens incapable under British law of purchasing the ship, entitled to a broker's commission because an alleged contract invalid under the law of the seller's and purchaser's domicile and of the ship's flag, is executed?

FIRST POINT.

THE ALLEGED CONTRACT EXECUTED BETWEEN THE DEFENDANT AND TEMPLEMAN AND MOULTON WAS UNENFORCIBLE AND VOID AND THE PLAINTIFF DID NOT EARN A BROKER'S COMMISSION FOR HAVING BROUGHT ABOUT ITS EXECUTION.

The plaintiff's whole case is based upon the theory that he produced purchasers for the steamer who made a valid contract to buy. In his brief in the Court below, counsel for the plaintiff stated, p. 2:

> "The action was brought by the plaintiff to recover the sum of $11,750, a balance of commission earned by the plaintiff *for having procured a contract for the purchase and sale of the SS. Eskasoni* owned by the defendant. * * *"*

This statement of counsel was in accordance with plaintiff's testimony. *Warner, fol.* 40.

In view of the inability of the alleged purchasers Templeman and Moulton to buy the steamer, the plaintiff has attempted to show that a valid contract was entered into and thus bring himself within the class of cases that hold that where a broker procures the execution of a valid contract he is entitled to his commission notwithstanding the transaction is not finally consummated.

Colvin vs. *Post Mortgage and Land Co.*, 225 N. Y. 510;
Kalley vs. *Baker*, 132 N. Y. 1;
Volker vs. *Fish*, 79 N. J. Equity 497, and the cases cited therein;

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*Italics ours.

Fox vs. *Ryan*, 240 Hill 391;
Mitchell vs. *Weddington*, 122 S. W. 802 (not reported in Ky. reports).

It has already been shown that the *Eskasoni* was a British ship situated at the port of Liverpool, England, and that Templeman and Moulton and the defendant were all British subjects.

The question thus flatly presented is whether the validity of an alleged contract for the sale of a British ship is to be determined by British or American law.

The decision of the majority of the Court below was that the validity of the contract for the sale of a British ship was to be determined by the law of the place where the contract was made, namely, New York. The rationale of this decision is based on the narrow ground that a ship is a mere chattel, just so much steel and iron. It completely dissociates ships from their national character, without which no ship can sail the seas. Without the vise of the British authorities a British ship could not even clear from an American port.

The decision of the majority of the Court below finds no welcome in the commercial requirements of the day, where ships are recognized as national as well as private instruments. In the light of common knowledge it is submitted that ships cannot be regarded as mere chattels because in addition to being so much steel and iron they have a national character granted to them by the laws of the sovereign whose flag they fly. Ships are today recognized as a part of the territory of the country

whose flag they fly, carriers to a large extent of their nation's laws as well as goods

The Scotia, 14 Wall. 170, 184;
Crapo vs. *Kelly,* 16 Wall. 610, 624;
Wilson vs. *McNamee,* 102 U. S. 572;
The Hamilton, 207 U. S. 398;
The International Navigation Co. vs. *Lindstrom,* C. C. A. 2nd Cir., 123 Fed. 475;
The Eaglepoint, C. C. A. 3rd Cir., 142 Fed. 453.

In *White's Bank* vs. *Smith,* 7 Wall. 646, this Court said (p. 655):

> "Ships or vessels of the United States are the creations of the legislation of Congress."

And at p. 656, further said:

> "Ships or vessels not brought within the provisions of the Acts of Congress are not entitled to the benefits and privileges thereunto belonging, and are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial, if not entire, value consists by right of character of national vessels and to have the protection of the national flag floating at the mast's head."

Practically every maritime nation in the world today, including the United States, has prescribed conditions under which its merchant vessels may be sold and transferred. In the Merchant Marine Act, 1920, our own Government has laid down the terms under which United States merchant vessels may be disposed of.

In view of the fact that the *Eskasoni* was a British ship and that her owner and proposed purchasers were British subjects and that the steamer at the time the alleged contract for her purchase was made was at Liverpool, England, it should be clear that the only law that should determine the validity of the alleged contract is British law.

In *Pritchard* vs. *Norton*, 106 U. S. 124, at p. 136 this Court said:

> "The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman* vs. *Southard*, 10 Wheat, 1, 48 where he defined it as a principle of universal law,—'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea has been expressed by Lord Mansfield in *Robinson* vs. *Bland*, 2 Burr. 1077, 1078, 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd* vs. *Guibert*, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that 'It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume they have submitted themselves in the matter. *LeBreton* vs. *Milles*, 8 Paige (N. Y.) 261."

It is submitted that even if the special character of ships is disregarded the fact that all parties were British

would indicate clearly that the parties were contracting under British Law.

In *Crapo* vs. *Kelly*, 16 Wall. 610, a ship owner residing in Massachusetts, owning a ship on the high seas bound for the port of New York, applied to the Insolvent Court of Massachusetts for the benefit of the insolvent laws of that State. Under the Massachusetts statute the judge of the Insolvent Court executed and delivered to an assignee in bankruptcy, a transfer of all the shipowners' property. Subsequently the ship being still on the high seas, a creditor of the shipowner in New York, in accordance with the laws of New York respecting non-resident debtors, sued out an attachment and when the ship arrived at the port of New York a few days later, it was seized by the Sheriff. On suit in New York between the assignee in Bankruptcy appointed by the Massachusetts Court and the Sheriff of New York to determine with whom was the prior right, it was held that the assignee in bankruptcy appointed by the Massachusetts Court had title to the ship.

At p. 629, Mr. Justice Hunt, who delivered the majority opinion of the Court, said:

> "Again the owners of this vessel and the assignee in insolvency were citizens of Massachusetts and subject to her laws. It is not doubted that a sale of property between them of property on board of this vessel, or of the vessel itself, would be regulated by the laws of Massachusetts."

The precise question involved in this case in connection with an American steamer, arose in the case of *Keeveny* vs. *Chas. R. McCormick & Co.* C. C. A. Second Circuit, 266 Fed. 314. In that case the plaintiff, a broker, sued the defendant as owner of the American motorship

City of St. Helens, to recover 5% commission alleged to be due him on the ground that he had found a purchaser acceptable to the defendant at a stipulated price. The plaintiff, a Frenchman, was the representative of a French syndicate. A formal contract was executed between the Frenchman representing the French Syndicate and the defendant, an American citizen, for the purchase of the ship for $460,000.

The United States Shipping Board refused to grant permission for the sale and for that reason it failed. The Court held that the broker was not entitled to any commission.

In the *Keeveny* case, if it had arisen in England, the decision of the majority of the Court below would be authority for holding that the broker in that case would have been entitled to a commission.

In finding that the alleged contract here in controversy was to be determined by American law, the defendant confidentially asserts that the Court below committed error. It is equally clear that neither Great Britain nor the United States would recognize sales of their ships, carrying their flag, made contrary to their respective laws and that if attempts are made to do so, seizures or other serious consequences will follow. It seems to us preposterous to say that a document signed between British subjects for the sale of a British ship located in Liverpool, England, depends for validity on the law of the place where the contract is made, when the law at the place where the ship is registered is the only law which can pass a good title to the ship as a commercial instrumentality. As pointed out in *White's Bank* vs. *Smith,* 7

Wall. 646, the substantial if not the entire value in a ship consists in its right of character as a national vessel. Unless a British purchaser could get the ship with a right to carry the British Flag he could get nothing of any use commercially.

In the final analysis it must be remembered that this was a commercial transaction and it should be dealt with as such. Viewed as a business matter, it is clear that what the defendant employed the plaintiff to do was to procure a purchaser who was qualified to buy the steamer. It is perfectly apparent from the record that Moulton and Templeman, the alleged purchasers, were neither able to buy nor able to enter into a binding contract to buy the steamer and that the sale failed because of the disability of the very persons procured by the plaintiff.

The situation which resulted from the Plaintiff's efforts was thus summed up by Judge Hough in his dissenting opinion:

> "The arrangement for which this Court rewards plaintiff below, would have subjected the purchasers to penalties if not to criminal prosecution, made the ship something that had better be kept hidden from the maritime power of Great Britain and rendered it practically impossible for vendors to stay in the shipping business. To produce such an embroglio is not a service, and to call it a sale is a misnomer. What seems to me error arises from totally disregarding the law of the ship's flag."

LAST POINT.

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED.

Respectfully submitted,

CLETUS KEATING,

Counsel for Petitioner.

INDEX OF POINTS.

Cases Cited in Brief of the Respondent.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

GASTON, WILLIAMS & WIGMORE, OF CANADA, LTD., Petitioner,	1921 Term, No. 280.
against	1922 Term, No. 59.
PHILIP A. WARNER, Respondent.	

Statement.

This cause comes before this Court on a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit to review the affirmance of a judgment in favor of the respondent, plaintiff below, and against the petitioner, defendant below, in a cause of action for breach of contract.

For convenience the parties to the litigation will be referred to as they were in the District Court.

The plaintiff brought this action at law to recover the sum of $11,750.00, balance of a commission earned by the plaintiff as a broker for having procured a contract for the purchase and sale of the SS. "Eskasoni", owned by the defendant. (Complaint, Record p 2.)

The case was tried twice in the District Court for the Southern District of New York, the first

trial resulting in a direction of a verdict for defendant. On appeal to the Circuit Court of Appeals for the Second Circuit the judgment was reversed and a new trial ordered. (261 Fed. Rep., p. 993.) The second trial resulted in a verdict in favor of the plaintiff, and the judgment upon such verdict was thereafter affirmed by the Circuit Court of Appeals for the Second Circuit. (272 Fed. Rep., p. 56.)

The Pleadings.

Plaintiff's complaint contained two causes of action, first, that the defendant agreed with the plaintiff "that if plaintiff should succeed in finding a purchaser for the said SS. "Eskasoni" at the price of $475,000.00, the defendant would pay to the plaintiff the sum of two and one-half per cent. upon such purchase price for his services in the matter." (Record p. 2.) That thereafter the plaintiff procured purchasers of the SS. "Eskasoni" who began negotiations for the same and "thereafter entered into a contract of purchase and charter for the said steamship . . . for the purchase price of $475,000.00." (Record p. 2.)

The second cause of action was for services rendered of the fair and reasonable and agreed value of $11,875.00. The case, however, was tried on the first cause of action and not on the second.

The defendant served an answer to the complaint. After the reversal of the judgment by the Circuit Court of Appeals, and prior to the second trial, the defendant served an amended answer. Therefore no reference is made here to the contents of the original answer.

The amended answer admits the incorporation of the defendant; admits offering the vessel for

sale; admits the making of the contract with the plaintiff; admits the production of the two purchasers, and alleges that the purchasers attempted to enter into the contract referred to. The amended answer denies the second cause of action.

As a separate defense the amended answer sets up §39cc of the British Defense of the Realm Act, which was set forth in the Record p. 8.

The amended answer also alleges that the British Government issued orders to the defendant prohibiting it from chartering or selling the vessel to the proposed purchasers (Record p. 9). The amended answer further sets up a usage or custom in the shipping business of the Port of New York that commissions do not become due and payable except as and when hire is paid by the charterer to the owner.

Facts.

The plaintiff, a citizen of the State of New York, and a resident of the City of New York (Record p. 13) had had business dealings with the defendant (Record p. 14), and in December, 1916, was authorized in writing, by the defendant, to seek a purchaser for the SS. "Eskasoni" (Record p. 14); Plaintiff's Exhibit No. 1, Record p. 56.

The defendant was a foreign corporation, organized and existing under the laws of the Dominion of Canada (Complaint p. 2); (Amended Answer p. 7). The "Eskasoni" was a British screw steamship of St. Johns, Newfoundland, and was owned by the defendant (Record p. 57). The defendant agreed to pay to the plaintiff 2½ per cent. commission for effecting the sale, and after the contract, Plaintiff's Exhibit No. 2, was entered into, paid to the plaintiff $125.00, representing

2½% on the first payment of $5,000.00 (Record p. 16). After the receipt of the letter (Plaintiff's Exhibit No. 1) plaintiff introduced to the defendant Philip Templeman and George Moulton (Record p. 14), and after the introduction, and after discussion between Moulton and Templeman and Gaston, Williams & Wigmore, a contract for the sale of the "Eskasoni" for the price of $475,000 was entered into between the defendant and Moulton and Templeman, and $5,000.00 was paid on account of such contract. (Plaintiff's Exhibit No. 2, Record, p. 56; Record, p. 16). On receipt of this $5,000.00 the defendant paid the plaintiff the said sum of $125.00 (Record p. 16).

It is urged by the defendant that the contract of December 11th, 1916, was but a tentative one, subject to whatever action should be taken by the British Government. The terms of the contract would not indicate that it was tentative in any sense. It is an absolute charter coupled with a Bill of Sale. It provides for the carrying on of the expenses of the vessel by the buyers, and for the buyers' compliance with any laws applicable to the ship. That it was an absolute contract, and never a tentative one, is proved by the letter of the defendant to the Master of the ship, which letter is dated December 12th, 1916. This will be found at p. 62 of the Record, fol. 122 *et seq.*, and in it the owners of the ship tell the Captain that the vessel has been disposed of through the broker's clients, and the letter states:

> "You will observe from the Ninth clause of the Charter party that you are, under the terms of said Charter party, in the employ of the purchasers only".
>
> Record p. 63, fol. 123.

Thereafter the defendant and the proposed purchasers agreed to cancel the contract, and the

proposed purchasers received back the sum of $5,000.00. Record p. 17. Defendant's Exhibit 9, Record p. 65

The defendant contends that this agreement to cancel the contract was reached between the purchasers and the seller because the British Government had refused to permit the purchasers to take title.

Austin, Vice-President of the defendant, was called as a witness to testify:

> "A. I went down to the British Consulate's Office here in New York to ascertain if there was any objection to the transfer being made, or the contract being entered into, to get the approval of the British authorities to the contract.
>
> Q. Did you secure his approval?
>
> A. No.
>
> Q. Did you ask him for his approval?
>
> A. Yes.
>
> Q. And what did he do to that request?
>
> A. Well he said that it could not be approved."
>
> Record pp. 2, 23.

No proof was given by the defendant that the British Government had refused permission to sell to the purchasers produced by the plaintiff. There was an attempt of such proof, but it is contained entirely in the following question put to Mr. Richardson, the British Vice-Consul at New York:

> "Q. Do you recall how this matter came to your attention Mr. Richardson?
>
> A. Well, it is three years ago and I cannot recall all the details, but if my memory serves me right we were approached in the Consulate by Gaston, Williams & Wigmore with a view to ascertaining whether the proposed sale of this vessel with some clients they had in view would be approved."
>
> Record pp. 28, 29.

* * * * * * *

"Q. And what did you do with that request?

A. My recollection is it was intimated to Gaston, Williams & Wigmore that the sale would not be approved."

Record p. 29.

From this it would appear that Gaston, Williams & Wigmore, the sellers of the ship, found it necessary to make application for leave to sell it, and that if there was a refusal that refusal amounted to a defect in the sellers title, and not in the buyers ability to perform. But in whichever light it is taken, we respectfully submit that an intimation is not a refusal, and that the record is silent as to any refusal on the part of the British Government to permit the transfer of the vessel.

Record p. 65.

The arrangement by which the contract was abrogated does not disclose that it was because of any intimation from the British Government. The record shows no proof that it was the act of the British Government and, therefore, on the record before this Court, it appears that the cancellation of the contract was by consent of the seller and the buyer, of which the broker had no knowledge, and that being so the broker is entitled to his commission.

FIRST POINT.

The contract employing Warner as a broker is to be construed by the laws of the State of New York as to its validity, construction and terms.

There are two distinct contracts involved in this litigation, first, the contract of employment

of the broker; and, second, the contract which the broker's customers made with the seller.

The contract of employment of the plaintiff was made in New York City on the 11th day of December, 1916, and is found in the Record as Plaintiff's Exhibit No. 1 at page 56:

"December 11th, 1916.

Mr. P. A. Warner,
30 Church Street,
New York City.

Dear Sir:—

Referring to our conversation this afternoon I beg to advise that you are authorized to offer the steamer "Eskasoni" for sale for four hundred and seventy-five thousand dollars, $475,000.00.

Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers.

Yours very truly,

J. B. Austin, Jr.,
Vice-Pres. & Gen. Mgr.

It will be noted that it does not say what flag the ship "Eskasoni" carried, or whether any particular law should govern the purchasers or the brokers. It is indeed the simplest and most binding form of a broker's contract of employment.

It is suggested by the defendant's counsel that of necessity the plaintiff was bound to take into consideration the law of England when he produced his purchasers, and that law must be read into the contract.

We submit that that is an error, and that the only laws which could be read into that contract were the laws of the State of New York and of the

United States, and that the courts will not read anything else into it. That contract having been made in the City of New York is governed by the laws of the State of New York.

In New York the law of this State

> "is settled by repeated adjudications that the law of the State where a contract is dated, and is to be performed, is to govern as to its construction and validity."
>
> Hildreth *v.* Sheppard, 65 Barber (N. Y.), p. 265, at p. 270.

In the case of a sale of a ship, the contract for which was drawn at New Orleans, although the owner lived in New York, the Court said:

> "It was also argued that this contract was not to be governed by the laws of Louisiana, but by the laws of New York, where the vendors resided. But the contract was made and performed in Louisiana, and must be governed by its laws".
>
> Bulkley *v.* Honold, 19 Howard, p. 390 at p. 392.

Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made.

> Scudder *v.* Union National Bank, 91 U. S., 406, at pp. 411 and 412.
>
> "Contracts are to be governed as to their nature, their validity and their interpretation by the law of the place where they were made unless the contracting parties clearly appear to have had some other law in view".
>
> Liverpool L. & W. Steam Co. *v.* Phoenix Ins. Co., 129 U. S., 397, at p. 453.
>
> "Reasonable intention of the parties to a contract is to be sought in the words of such contract, not assumed, and it is not the duty of the court to bend the meaning of some of

the words of a contract into harmony with the supposed reasonable intention of the parties."

Crimp *v.* McCormick Construction Co., 72 Fed. Rep., 366. Syllabus and at p. 371.

The contract of employment, therefore, having been made in New York is to be construed by the law of the State of New York, and nothing will be written into it implying that any other law than that of the State of New York was in the contemplation of the parties.

SECOND POINT.

The plaintiff fulfilled the entire terms of his contract with the defendant and was entitled to recover the sum of $11,750.00, the balance under said contract.

The record discloses that the plaintiff and the defendant on the 11th day of December, 1916, entered into an agreement in writing, wherein and whereby the defendant employed the plaintiff to sell the SS. "Eskasoni" for the sum of $475,000.00, the details as to terms of payment, transfer of steamer, etc., to be determined when the plaintiff had obtained purchasers. (See Plaintiff's Ex. 1, Record, p. 56).

The making of the contract (Plaintiff's Exhibit No. 2, Record p. 56) is admitted, as is the payment of $5000 by the proposed purchasers, Templeman and Moulton, at the time of the signing of the contract, (Plaintiff's exhibit No. 2, record p. 57) and the record shows that at the time this first payment was made, the defendant

paid to the plaintiff, on account of his services, $125.00, being his 2½% commission on the said first payment of $5000. (Record p. 16).

The case at bar is entirely different from an ordinary case of a broker suing to collect commissions, because in the case at bar the contract which was signed (Plaintiff's Ex. 2) is evidence that there was a meeting of the minds of the buyer and the seller. The record shows that a first payment of $5000.00 was made at the time of the signing of the contract, and that the defendant paid to the plaintiff 2½% of the first payment as the plaintiff's share for having brought the contracting parties together.

It will be borne in mind that the plaintiff in the case at bar is not suing for commissions, but that he is suing for the balance due him under his contract and for the work, labor and services rendered by him.

The plaintiff was not an ordinary broker who was offering a common article of merchandise for sale in a common market. He was employed under a specific contract to sell the SS. "Eskasoni" for the sum of $475,000.00. There were no restrictions as to who the buyer should be, but the contract of his employment definitely stated: "details as to the terms of payment, transfer of steamer, etc. can be talked over when you have the purchasers" (Plaintiff's Ex. No. 1, Record, p. 56).

In accordance with the terms of the contract under which the plaintiff was employed he produced the buyers, and they talked over with the seller the details of the purchase and sale of the steamship, and, after the seller (defendant herein) had negotiated with the buyer, the seller entered into a contract (Plaintiff's Ex. 2, Record, p. 56) wherein and whereby the defendant, as

the seller, accepted the purchasers produced by the plaintiff, signed the contract with such purchasers, accepted such purchasers' money, and paid to the plaintiff his share of the commission on the first payment under the said contract.

It is elementary that where a broker brings the buyer and seller together and they enter into a contract, *for which the broker was employed to act*, that the broker becomes entitled to his commission, provided the contract of sale entered into between the buyer and the seller is on the terms for which the broker was authorized to negotiate the contract.

See 9 Corpus Juris, 595.

In the case at bar Warner was employed to sell the SS. "Eskasoni" for $475,000.00, the details of the transaction to be determined when the purchaser was produced. Warner produced the purchasers and the seller entered into a contract with the purchasers and accepted the purchasers' money. Warner completed the full terms of the contract under which he was employed.

It has been argued, and made the argument in cases such as this, that the broker only becomes entitled to his commission when he finds a purchaser ready, able and willing to buy, but it is submitted that the situation of Warner, the plaintiff in this action, is entirely different from an ordinary broker. Warner's instructions in writing were to find a purchaser for the ship at $475,000.00, the details of the purchase to be determined upon when he found a purchaser, and when the contract (Plaintiff's Ex. 2, Record, p. 56) was entered into between the defendant and Templeton and Moulton the plaintiff's duties were ended.

In other words, the seller accepted the purchaser. Even in cases of general brokerage where the seller accepts a purchaser it has been held that the broker is entitled to his commission.

See Hadley *v.* Schaffer, 177 Ala., 636.

"If such purchaser is accepted by his (the broker's) principal this dispenses with the necessity of showing that the purchaser was ready, able and willing to buy, since acceptance is taken as a conclusive admission of that fact."

Hadley *v.* Schaffer, 177 Ala., 636.

"The plaintiff had performed the services for which he was employed and after his work had been done, the defendants could not relieve themselves of the obligation to pay his earned compensation by exacting further concessions."

Halperin *v.* Schachney, 27 Misc., 195, at p. 198;

Alt *vs.* Doscher, 102 App. Div., 344, affirmed on opinion below, 186 N. Y., 566;

Slocum *vs.* Ostrander, 141 App. Div., 380, affirmed 205 N. Y., 617;

Bauman *vs.* Nevins, 52 App. Div., 290;

Brady *vs.* Foster, 72 App. Div., 416;

Fleet *vs.* Barker, 120 App. Div., 455;

Callister *vs.* Wichern, 147 App. Div., 14.

When through the procurement of a broker, employed to effect an exchange of real estate, a contract for the exchange has been agreed upon and entered into between his customer and the person with whom the exchange was to be effected, in the absence of any express agreement to the contrary the broker is entitled to his commission.

Kalley *v.* Baker, 132 N. Y., p. 1.

"Ordinarily, to earn his commissions a broker must accomplish what he undertook

to do in his contract of employment. Yet, even failing to do so, if he produces a buyer with whom the owner is satisfied, and who contracts with the owner at a price and upon terms satisfactory to the latter, the broker is entitled to compensation."

Colvin *v.* Post Mortgage & Land Co., 225 N. Y., 510, at p. 514.

See also:

Wray *v.* Carpenter, 16 Co., 271.
Wright *v.* Brown, 16 Mo. Ap., 577.
Schlegel *v.* Fuller, 149 Pac. Rpts., 1118.
Bailey *v.* Padgett, 77 So. Rep., 637.
Bunnell *v.* Chapman, 173 A. D., 108, at p. 109.
Sibbald *v.* Bethlehem I. Co., 83 N. Y., 378.
Levy *v.* Ruff, 4 Misc., 180.
Jewett *v.* Emson, 2 Supr. Ct. Rep. (N. Y.) 167.

The contract employing the plaintiff to negotiate the sale was legal where made, and as the defendant placed no restriction upon the person to whom the sale should be made, plaintiff became entitled to the full amount of his commission the minute the defendant entered into a contract with the purchaser produced by plaintiff.

THIRD POINT.

The employment of Warner, as evidenced by Plaintiff's Exhibit No. 1 (Record p. 56) was legal where made.

The contract employing the plaintiff as a broker, Plaintiff's Exhibit No. 1, Record p. 56,

employs him to sell a steamer called the "Eskasoni" at the price of $475,000.00. The details of the terms of payment, transfer of the steamer, etc., to be determined when a purchaser was produced.

It requires no citation of authorities to prove that a simple contract of employment of a broker is legal in the State of New York. The courts will not say that parties entering into such a formal agreement intended to do an illegal act. The presumption is in favor of the legality of the act intended to be done under the contract.

Richards *v.* Wiener Co., 207 N. Y., 65.
Kannengresser *v.* Israelowitz, 107 Misc. 349 at p. 351.
Lorillard *v.* Clyde, 86 N. Y., 384.
Shore *v.* Wilson, 9 Clark & Fin, 397.

The only thing upon which a question might possibly be raised as to the validity of such contract of employment would be the question of the nature of the property intended to be covered by the contractual relations; in this case a ship. The contract in this case does not say the *British ship* "Eskasoni"; it merely says the steamer "Eskasoni". It does not say that the buyers must comply with the British Law. On the contrary, it states that the terms of payment, transfer of steamer, etc., could be talked over when the purchasers were produced. The purchasers were produced and the formal contract was entered into. The authorities cited in Point II of this brief establish that on the signing of the contract between the purchaser and the seller a completed deal was made as far as the broker was concerned.

The subject matter of the contract of employment, a ship, was proper subject matter for such a contract.

A ship is only personal property and can be transferred by possession or by a Bill of Sale. The title to a ship passes the same as any other chattel.

The Active, Fed. Cas. 34 (Olcott 286).
The Amelie, 73 U. S. (6 Wall.) 18.

Nor do the registration acts of the various countries affect the right of the title owner of a ship to pass title to it. The registration acts merely give to a ship certain rights and privileges under the law of the country where she is registered, but the builder and owner of her may convey her, and the property will vest in the purchaser independently of the registration acts. This is true in England as well as in the United States.

Reis & Others *v.* Fairbanks, 21 L. T., 166; 13 C. B. 692; 17 Jn. 918; 22 L. J. C. P. 206.

Pritchard's Digest of the Law and Practice in the High Court of Admiralty of England, 56, p. 593.

"In England and the United States the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise."

The Benito Estanger, 176 U. S. 568, at p. 578.

To make a Bill of Sale valid it need not be filed in the Custom House.

Hozey *v.* Buchanan, 41 U. S. (16 Pet.) 213.

The law requiring the register to be inserted in the Bill of Sale on transfer of a ship refers mere-

ly to her character and privileges as an American ship.

The Amelie, 73 U. S. (6 Wall.) 18.

The registration of vessels is not compulsory on their owners; it being a privilege and advantage of which they may, or may not, avail themselves as they choose.

Davidson *v.* Gorham, 6 Cal. 343.

If a registered vessel is assigned to a foreigner she is only deprived of her American character.

Philips *v.* Ledley, Fed. Cas. 11096 (1 Wash. C. C. 226).

A change of registry is not necessary in the sale of a ship to transfer the property in it, the effect of not obtaining a new registry being merely that the ship loses the privilege of an American bottom.

Hatch *v.* Smith, 5 Mass. 42.

FOURTH POINT.

The statutes of Great Britain, known as the British Defense of the Realms Act, are penal in their nature and have no force in the United States.

The defendant attempted on the trial to prove the English law by a lawyer who had been a member of the American Bar since 1882, and who had been a British Barrister before coming to the United States.

(Record, p. 31.)

The plaintiff contends that this witness was not qualified, and that his testimony was improperly heard.

(Record, p. 33.)

This witness attempted to show that by the British Defense of the Realms Act the contract for the purchase and sale of the "Eskasoni" was invalid as against the public policy of England, that it contained very strong penalties, and that in England it could not be enforced;

(Record, p. 33.)

and the witness cited the case of the Anglo-Russian Merchant Traders *vs.* Batt & Co., 2 King's Bench, 269. The witness did not anywhere testify that the British Courts had ruled against the particular sections of the British Defense of the Realms Act relating to the sale and transfer of ships, but merely testified that as to a great many of these regulations no civil right could spring from such a contract.

(Record, p. 33.)

Nowhere in his testimony was he asked, or did he state, that a broker employed to find a purchaser for a British ship would come in under the Defense of the Realms Regulations, or that his contract of employment was invalid, or that the broker could not recover. Consequently it is left to the Court to construe the Defense of the Realms Regulations and determine whether or not those Regulations excluded the plaintiff from the right to recover for the services rendered by him.

a. It has been held since time immemorial that the penal laws of a foreign jurisdiction cannot be enforced in another jurisdiction.

Story on Conflict of Laws, 7th Ed. Ch. 2, Sections 18, 19.

"Another maxim or proposition is that no State or Nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein."

Story on Conflict of Laws, 7th Ed. Ch. 2, §20.

b. The Defense of the Realms Regulations are penal in their nature and cannot be enforced in this jurisdiction.

"I think the Supreme Court in 127 U. S. (Wisconsin *v.* Pelican Inc. Co., 127 U. S. 265) meant to confine the operation of the rule that no country will execute the penal laws of another to such laws as are properly classed as criminal."

Huntington *v.* Attral, 146 U. S., 657, at p. 665.

Mr. Justice Gray, in Huntington *v.* Attral, *supra*, entered into a very full discussion of what were penal laws, and what were not penal laws, and summed up the whole subject in the following sentences:

"All breaches of duty that confer no rights upon individuals or persons and which the State alone can take cognizance of are in their nature criminal, and that all such come within the rule."

Huntington *v.* Attral, 146 U. S., p. 657, at p. 665.

"The test whether a law is penal, in a strict and primary sense is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual."

Huntington *v.* Attral, 146 U. S., p. 657, at p. 668.

"The courts of no country execute the penal law of another."

The Antelope, 23 U. S. (10 Wheaton), p. 66, at p. 123.

"It is well settled, and is not denied by plaintiff's counsel, that the penal laws of one State can have no operation in another. They are strictly local and affect nothing more than they can reach."

Flash *v.* Conn, 109 U. S., 371, at pp. 376, 377.

See also,

Wisconsin *v.* Pelican Ins. Co., 127 U. S., p. 265, at p. 290.

Northern Pac. Ry. Co. *v.* Babcock, 154 U. S. 190, at p. 198.

Texas & Pacific Ry. Co. *v.* Cox, 145 U. S., p. 593, at p. 604.

Brady *v.* Daly, 175 U. S., p. 148, at p. 155.

Schick *v.* U. S., 195 U. S., p. 65, at p. 77.

The witness cited, in support of the conclusions stated by him, the case of the Anglo-Russian Merchant Traders, Ltd. *v.* John Batt & Co., Ltd., 2 King's Bench, p. 679.

We submit that the case cited is not in point. In that case both of the parties to the contract out of which the suit arose were citizens of Great Britain; they were within the jurisdiction of Great Britain; the property which was the subject matter of the contract was within the jurisdiction of Great Britain, and the law was a British law known to both of the parties to the contract, and they made the contract knowing of the existence of the law. See report of Arbitrator, 2 King's Bench, p. 679, at p. 681.

The suit was brought for the breach of the contract because the seller failed to deliver and ship

something which had been prohibited by law from being shipped, and the Court sustained the seller in its defense that owing to existing regulations it could not be compelled to carry out the contract, because the carrying out of the contract would have been a violation of law.

That is not the situation here. Warner, an American citizen, entered into a valid contract to render his services as broker, and performed his services. It must be presumed that the contract of employment of Warner was for employment in a legal venture. Illegality cannot be presumed. There was nothing in the law of the United States, or of the State of New York, the place where the contract of employment was entered into, which made such employment illegal and, consequently, the decision quoted by the expert witness has no application in this jurisdiction. That decision is in line with what this Court had already held in the case of Keveny *v.* McCormick & Co., 266 Fed. Rep. P. 314 at p. 315, where this Court said:

> "Although nothing was said upon this subject in the contract the statute is written into it as a part of the law of the land where the contract was made and to be executed."

So, in the case at bar, the contract employing Warner to render his services was made in New York; the contract on Warner's part was to be executed, and was executed, by him in the State of New York; the subject matter of Warner's duty under the contract was the rendition of his own personal services, so that all of the elements of his contract of employment were within the jurisdiction where the contract was made, and the law of that place, to wit, the law of the United States and of the State of New York, applies to the contract to the exclusion of the law of the foreign country.

The second case cited by the expert witness was that of Metropolitan Water Board *v.* Dick, Kerr & Co., 2 King's Bench Division p. 1. That likewise has no application to the case at bar. That was a case where for war time necessities work under a public contract of construction was suspended under the Defense of the Realm Regulations. Again both of the parties of the subject matter were subject to the jurisdiction of the British Courts, and both of the parties were aware of the law.

In the case at bar the witness Warner did not know of the bunkering agreement, or of the British law, or that Moulton and Templeman might be unsatisfactory to the British Authorities.

Record pp. 18 and 19.

FIFTH POINT.

The defendant did not prove the refusal of the Shipping Comptroller to consent to the sale of the ship.

The defendant attempted to prove by the witness Austin that, after the contract for the sale of the "Eskasoni" had been signed, the British Government objected to the sale. It will be noticed that the Defense of the Realms Regulations are that the Shipping Comptroller must give the consent. The testimony of Austin is to the effect that he went to the British Consul's office and saw the Assistant Consul, Mr. Richardson, who said that the sale would not be approved.

Record pp. 21 and 22.

Mr. Richardson, when called as a witness for the defendant, testified as follows:

"My recollection is it was intimated to Gaston, Williams & Wigmore that the sale would not be approved."

Record p. 29.

Austin further testified that the ship did not get here until July, 1917, Record p. 28, so that the very terms of the contract, Plaintiff's Exhibit 2, could have been enforced any time up until July. By Defendant's Exhibit A it will be seen that the contract was cancelled by mutual consent (Defendant's Exhibit A, p. 65), and it will be noticed from Austin's testimony that there was an agreement between Austin and Moulton and Templeman when they agreed to accept back the check for the first payment that Moulton and Templeman could buy the boat at a later date.

Record p. 26.

We respectfully insist that the evidence on the part of the defendant, seeking to show that the British Authorities objected to the sale, is not sufficient, and that the defendant has failed in its proof.

SIXTH POINT.

The failure to obtain the consent of the British Authorities to the sale of the "Eskasoni" was a failure of the defendant because of a defect in its title.

The defendant was subject to the British Bunkering Agreement and could not sell the ship until it obtained the consent of the British Government.

The witness Austin testified:

"We were anxious to sell them the boat or we would not have worked on it all that time. When the time came to make the first move we were confronted by an obstacle which we could not get over, namely, the lack of the approval of the British Authorities, our Company being a subscriber, among others, to the British Bunkering Agreement. When we found that we could not get over that we told them what the circumstances were, and, having other things to do, I dropped the case and worked with other business."

Record p. 48.

And he further testified (Record pp. 25 and 26) that he went to the British Consul to get approval of the sale. (Record, p. 21). Mr. Richardson, the British Vice-Consul, testified that Gaston, Williams & Wigmore approached him "with a view to ascertaining whether the proposed sale of this vessel with some clients they had in view would be approved." (Record, p. 29).

It will be seen from the foregoing references to the testimony that the defendant first accepted the purchasers found by the plaintiff and entered into a contract in writing and accepted the first payment on said contract, paid the plaintiff on account of his services, and then applied to the Government of which it was a citizen for permission to carry out the terms of the contract. If there had been a definite refusal of permission, and if the defendant had proved this definite refusal, nevertheless the failure of the defendant to obtain the permission of the Ship Comptroller of Great Britain was a defect in the defendant's own title, and this defect cannot rob the plaintiff of his right to his commission.

The situation is identical with the failure of title in a real estate transaction, and the reported

cases in real estate matters are directly in line and controlling in such a situation.

Smith *v.* Peyrot, 201 N. Y. 210, at p. 214.
Tieck *v.* McKenna, 115 A. D. 704, and cases cited.
King *v.* Knowles, 122 A. D. 414.
Reis Co. *v.* Zimmerli, 224 N. Y. 351.
Cusack *v.* Ackman, 93 A. D. 579.
Dorlon *v.* Forrest, 101 A. D. 32.
Kalley *v.* Baker, 132 N. Y. 1 at p. 5.

"In Knapp *v.* Wallace, 41 N. Y. 477, the defendant employed a broker to purchase certain real estate for the price named, agreeing to pay him one per cent. on that price for his services. * * * As a defense to an action brought to recover the commissions defendant sought to show that the title of the vendor was defective, and for that reason was unable to perform his contract. It was held that 'it was no defense to the plaintiff's claim that the title to the property was defective. Mossmore (the broker) had not undertaken that it should be good. The contract between him and the defendant did not place his right to compensation on such a condition.' "

Kalley *v.* Baker, 132 N. Y. 1 at p. 5.

SEVENTH POINT.

The case of Keeveny vs. McCormick, 266 Fed. Rep. 314, is not in point.

The Keeveny case, heretofore decided by this Court, was a case where Keeveny, an American citizen, and employe of the defendant, a corporation organized under the laws of California, sued to recover commission for effecting a sale of an

American ship. A contract was signed and a payment made in escrow, to be paid on delivery of a Bill of sale. The United States Shipping Board refused to grant permission for the sale, and the contract was never consummated. In the Keeveny case, however, the broker and the seller were American citizens. The ship was an American ship, in the jurisdiction of the American Courts. The American citizens were presumed to know the law, or at least their ignorance of it was no excuse, and this Court rightly held that the law necessarily was written in the contract because it was part of the law of the land where the contract was made and was to be executed. But in the case at bar, the law which it is attempted to read into the contract was a foreign law. The place where the contract was made was in a foreign jurisdiction from that of the law relied on. The broker in the case was not an employe of either of the parties, prior to the single transaction in suit. The broker was an American citizen. The contract of his employment was made in America, and was a valid contract where made, and the contract itself, as reference to it will disclose, was intended to be carried out in the jurisdiction of the State of New York, and not within the jurisdiction of the country whose law is relied upon.

The test to be applied is whether the contract of employment was legal where made and where it was to be carried out. Warner's contract of employment was legal in the State of New York where he was to execute it, and the mere fact that the British subjects themselves could not validly enter into or carry out the contract of sale, owing to their allegiance to Great Britain, does not deprive Warner of his right to recover.

The objection that the contract is void as against public policy can only be sustained in the jurisdiction whose law it is claimed it contravenes:

> "This court has several times held that such an action as this, involving the validity of such a contract upon grounds of public policy, is not a Federal question, but one for the exclusive jurisdiction of our own courts".
>
> Beck *v.* Bowman, 187 A. D., p. 774, at p. 783, and cases cited.

Care must be taken not to confuse the contract for the sale of the ship with the contract of employment made with Warner. The British statute referred to does not cover the employment of the broker, nor could it apply to Warner's contract of employment in this jurisdiction, even if it did specifically refer to it.

In the case of Irwin against Williar, 110 U. S. 499, the question of the legality of the contract under which the broker claimed his commissions was raised and discussed very thoroughly by the Court. The Court said at page 510, referring to an illegal contract:

> "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such a case being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances."
>
> Irwin *v.* Williar, 110 U. S. 499, at p. 510.

It is respectfully submitted that in the case at bar the contract entered into between the plaintiff and the defendant in the City of New York, on the 11th day of December, 1916 (Plaintiff's Ex. 1, Record p. 56), followed out, as it was, by the sign-

ing of the contract (Plaintiff's Ex. 2, Record pp. 56 and 57) and by the payment to the plaintiff of a portion of his commission on account, was valid and enforceable irrespective of the terms of the British Defense of the Realm Act.

LASTLY.

It is respectfully submitted that the decree of the Court below should be affirmed.

JOSEPH P. NOLAN,
Counsel.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD. *v.* WARNER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 59. Argued October 13, 1922.—Decided November 13, 1922.

The Canadian owner of a British ship of a Canadian port made a contract in New York with W, a citizen of that State, authorising him to offer the vessel for a specified price and agreeing to pay him a specified commission for securing a purchaser. W introduced purchasers with whom the owner agreed for a charter and sale at that price, the ship to be delivered and the price paid at New York; but, it subsequently appearing that the owner was bound by contract with, and regulations of, the British Government not to sell without that Government's consent, which could not be obtained, the contract of sale was rescinded. *Held*, That W's contract, made without reference to nationality or location of the ship or to foreign law, was governed by, and valid under, the law of New York, and that the owner's disability to consummate the transaction was not a defense to W's action for his commission, even if, under the British law, the contract of sale was void. P. 203.

272 Fed. 56, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, which affirmed a recovery by the respondent in his action against the petitioner for commission on the sale of a ship.

Mr. Cletus Keating for petitioner.

Mr. Joseph P. Nolan for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The parties to this action on December 11, 1916, in New York City, entered into a contract, the essential terms of which appear in the following letter from petitioner to respondent:

"Referring to our conversation this afternoon, I beg to advise that you are authorized to offer the steamer Eskasoni' for sale for four hundred and seventy-five thousand dollars, $475,000.

"Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers."

Respondent was a citizen of the State of New York and a resident of New York City. Petitioner was a foreign corporation, organized and existing under the laws of the Dominion of Canada. The steamship referred to was a British steamship of St. Johns, Newfoundland, owned by the petitioner. It was agreed that the respondent should receive two and one-half per cent. commission for securing a purchaser for the ship. Respondent undertook the employment and subsequently introduced to petitioner two prospective purchasers, with whom petitioner entered into a written contract for the charter and sale of the ship for the sum mentioned. Five thousand dollars was paid down on account, out of which respondent received two and one-half per cent., or $125.

Subsequently it appeared that the petitioner was bound by a contract with the British Government to comply with the instructions and rules of that government in the operation of its vessels, and whereby it agreed not to charter any vessel to anyone to whom that government should object. Among the governmental regulations then in force was one which provided that:

"A person shall not, without permission in writing from the Shipping Comptroller, directly or indirectly and

whether on his own behalf or on behalf of or in conjunction with any other person, purchase, or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel."

Any act in contravention of this regulation was declared to be an offense.

Permission to make the sale in question was never obtained and the petitioner was notified by its Consul that such permission would be withheld by the British Government. The petitioner thereupon refused to consummate the sale and returned to the purchasers the $5,000 which they had paid.

The respondent brought an action against petitioner in the District Court of the United States, Southern District of New York, to recover the balance of his commission, which resulted in a judgment in his favor. On error from the Circuit Court of Appeals for the Second Circuit, that court affirmed the judgment of the lower court, and the petitioner brings the case here on writ of certiorari.

The District Court declined to charge, as requested by petitioner, that, if the jury believed the evidence to the effect that the contract under British law was illegal and void, this would constitute a good defense to the action. On the contrary, that court instructed the jury in effect that the invalidity of the contract under British law would constitute no defense to the action, and directed a verdict for the respondent, which was returned in the sum of $11,750; and judgment was entered accordingly.

The contract, as stated, was made in New York, and it does not appear that the contracting parties in making it had in view any other law than that of the place where it was made. It is, therefore, to be governed as to its validity and operation by the law of the State of New York. *Bulkley* v. *Honold*, 19 How. 390, 392; *Scudder* v.

Union National Bank, 91 U. S. 406, 412. Tested by that law the contract is valid. By the terms of the contract respondent was "authorized to offer the steamer 'Eskasoni' for sale for four hundred and seventy-five thousand dollars." Nothing was said as to where the ship then was, what flag she carried nor what law was to govern the transaction. The contract of charter and sale provided for the payment of the consideration in several installments in New York City and for the delivery of the ship to the purchasers at that port.

When, in pursuance of this contract, respondent procured purchasers for the ship at the stated sum, with whom petitioner entered into contract, the transaction, so far as the respondent was concerned, was completed and he became entitled to the payment of the stipulated commission. The fact that the contract of charter and sale was subsequently canceled because petitioner was unable to secure the consent of the British Government to the sale could have no effect upon the respondent's rights. The contract with respondent, as well as the contract of charter and sale, was made and was to be performed within the State of New York, and being valid under the law of that State, the respondent is not to be deprived of his compensation simply because petitioner found itself unable to consummate the latter contract by reason of its inability to perform a condition made necessary by the provisions of the law of another country. See *Aber* v. *Pennsylvania Co., etc.*, 269 Pa. St. 384.

Even if the contract of sale was void by British law, all other questions aside, respondent's connection with it was not such as to deprive him of his commission. His action was not to enforce that contract, but his own. *Irwin* v. *Williar*, 110 U. S. 499, 509–510.

We find no error in the judgment of the Circuit Court of Appeals and it is

Affirmed.